THE PILOT JUDGMENT PROCEDURE AT THE EUROPEAN COURT OF HUMAN RIGHTS: AN EVALUATION IN THE LIGHT OF PROCEDURAL EFFICIENCY AND ACCESS TO JUSTICE.

Eline Kindt

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Ghent University

Co-Supervisor: Prof. dr. Yves Haeck

Co-Supervisor: Prof. dr. Stefaan Voet

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SUMMARY

It has been stated multiple times that the European Court of Human Rights has become a victim of its own success. In the last two decades, it has been flooded with a constant stream of incoming petitions, ultimately impeding on its efficient functioning. The pilot judgment procedure was created for and by the European Court of Human Rights to try to manage this historic backlog. The Court had noticed that a large portion of its backlog consisted of repetitive cases which had their origins in systemic or structural issues in some of the Member States of the Council of Europe. The pilot judgment procedure was created by the Court in 2004 to tackle just these kinds of cases. When reduced to its very core, the pilot judgment procedure can be described as a procedure whereby an individual case or a combination of cases, classified by the Court under priority treatment, is used to diagnose a structural problem in the respondent State and gives instructions to that State as to how to remedy the issue. In the ideal scenario, the other similar cases are generally kept pending, awaiting their repatriation after the home State has set up an effective domestic remedy in execution of this pilot judgment. These applicants are thus barred from accessing the Court.

This research centres around four main research questions. First, this thesis questions how the pilot judgment procedure works in practice. The procedure was created out of practice, leaving a lot of uncertainty concerning how it works in reality. Second, the research looks at the pilot judgment procedure from the viewpoint of the Court itself and investigates whether it is procedurally efficient. Third, the perspective of the applicants is taken into account whereby the focus is laid on the question whether the procedure hinders their right to access to justice. Last, the fourth research question wants to combine all of these insights and asks how the procedure can be made procedurally efficient while also accessible to the applicants.

The dissertation is divided into six major parts. The first part introduced the research and sketches the theoretic framework within which it has taken place. The second part maps the complexity of the pilot judgment procedure: what is this procedure; which cases does it pertain to; where does it originate from; what is its role in the institutional design of the Council of Europe and to what has it evolved now? The third part looks into procedural efficiency and explains how the procedure works in terms of the efficiency parameters of case-load, simplicity/complexity of the underlying issue, productivity, length of proceedings and clearance rate. The fourth part then evaluates the pilot judgment procedure in the light of access to justice based on the following criteria: access to legal representation, access to clear legal information, access to alternative dispute resolution mechanisms, the use of fair procedures and due process - including concepts of procedural justice - and the use of appropriate case management tools. The fifth part focusses on the influence of the pilot judgment procedure on the level of execution of pilot cases. The sixth and last part then comes to a conclusion on the four main research questions.

This thesis concludes with four main points. First, it poses that the pilot judgment procedure has grown out of its infancy and has entered a new phase of consolidation. What this phase looks like is further enumerated in the thesis. Second, this dissertation clarifies that the procedure is indeed efficient under certain circumstances: State cooperation is a necessary condition, the Court should refrain from indicating complex general measures and should take

some measures in order to preclude the perverse effect of the pilot judgment procedure of attracting more similar cases. Third, this thesis concludes that the pilot judgment procedure lacks accessibility and proposes that the Court improves access to clear legal information, only allows friendly settlements and unilateral declaration when the State cooperates, draws inspiration from the certification stage of the class action procedure, considers founding a specialised division within the Court's Registry and creates the possibility to argue differentiation for the applicants in the similar pending cases. Last, this dissertation ends with some suggestions for further research.

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Reeds meermaals is gesteld dat het Europees Hof voor de Rechten van de Mens het slachtoffer geworden is van haar eigen succes. De voorbije twee decennia werd het namelijk overspoeld door een continue stroom van verzoeken, wat uiteindelijk zijn tol eist op haar functioneren. De pilootarrest procedure werd in het leven geroepen door het Hof met de bedoeling deze historische achterstand weg te werken. Het Hof had namelijk opgemerkt dat een groot deel van deze achterstand namelijk bestond uit repetitieve zaken die hun oorsprong hadden in systemische of structurele problemen in bepaalde van de Lidstaten van de Raad van Europa. De pilootarrest procedure werd gecreëerd door het Hof in 2004 voor net dit soort zaken. Kort samengevat kan de pilootarrest procedure beschreven worden als een procedure waarbij een individuele zaak of een combinatie van individuele zaken, geclassificeerd door het Hof onder prioritaire zaken, gebruikt wordt om een structureel probleem in een betrokken staat vast te stellen en zodoende instructies te verlenen aan die staat over hoe dat probleem kan aangepakt worden. In een ideaal scenario worden de andere hangende zaken hangende gehouden tot wanneer de staat de algemene maatregelen opgelegd door het Hof in het pilootarrest heeft uitgevoerd. Daarna worden deze hangende zaken dan teruggestuurd naar het nationale rechtssysteem om daar opgelost te worden. Deze verzoekers worden dus de toegang tot het Hof ontzegd.

Dit doctoraatsonderzoek gaat in op vier onderzoeksvragen. Ten eerste wordt onderzocht hoe de pilootarrest procedure werkt in de praktijk. Aangezien de procedure ontstaan is uit de praktijk, heerst er nog onzekerheid rond wat het is en hoe het werkt. Ten tweede bekijkt deze thesis de pilootarrest procedure vanuit het standpunt van het Hof zelf en vraag het zich af of de procedure wel efficiënt is. Ten derde wordt ook het standpunt van de verzoekers ingenomen. De focus wordt hier gelegd op de vraag of de procedure het recht op toegang tot de rechter verhindert. Tenslotte brengt dit doctoraatsonderzoek al deze inzichten samen en vraagt het zich af of de procedure zowel procedureel efficiënt als toegankelijk kan gemaakt worden.

Deze dissertatie bestaat uit zes delen. Het eerste deel introduceert het onderzoek en schetst het theoretisch kaderwerk waarbinnen het onderzoek heeft plaatsgevonden. Het tweede deel brengt de complexiteit van de pilootarrest procedure in kaart: wat is het, op welke zaken heeft het betrekking, waaruit is het ontstaan, wat is de rol van de procedure in het institutioneel raamwerk van de Raad van Europa en tot wat is het geëvolueerd? Het derde deel gaat dan dieper in op

procedurele efficiëntie en legt uit hoe de procedure werkt in de context van een aantal efficiëntieparameters: case-load, eenvoud/complexiteit van het onderliggend probleem, productiviteit, duur van de procedure en clearance rate. Het vierde deel evalueert de pilootarrest procedure vervolgens in het licht van het recht op toegang tot de rechter, op basis van de volgende criteria: toegang tot vertegenwoordiging, toegang tot duidelijke juridische informatie, toegang tot mechanismen voor alternatieve geschillenbeslechting, het gebruik van eerlijke procedure en het recht op een eerlijk proces – met inbegrip van concepten van procedurele rechtvaardigheid – en het gebruik van geschikte casemanagementtools. Het vijfde deel legt zich toe op de invloed van de pilootarrest procedure op de graad van uitvoering van pilootzaken. Het zesde en laatste deel komt dan tot een conclusie en formuleert een antwoord op de vierde onderzoeksvraag.

Deze thesis eindigt met vier centrale argumenten. Ten eerste wordt gesteld dat de pilootarrest procedure uit zijn kinderschoenen is gegroeid en een nieuwe geconsolideerde vorm heeft bereikt. Welke vorm dit is en hoe deze eruit ziet wordt verder uitgelegd in de conclusie van deze thesis. Ten tweede verduidelijkt deze dissertatie dat de procedure inderdaad efficiënt is onder bepaalde voorwaarden: de medewerking van de staat is een noodzakelijke voorwaarde, het Hof moet zich onthouden van complexe algemene maatregelen op te leggen en het moet maatregelen nemen om het perverse effect van de piloot arrest procedure, namelijk het aantrekken van meer soortgelijke zaken, tegen te gaan. Ten derde concludeert deze thesis dat de pilootarrest procedure toegankelijkheid mist en stelt voor dat het Hof de toegang tot duidelijke juridische informatie verbetert, enkel minnelijke schikkingen en eenzijdige verklaringen toestaat wanneer de betrokken staat medewerking verleent, dat het Hof inspiratie moet putten uit de certificatie fase uit de class action procedure, dat het Hof moet overwegen om een gespecialiseerde divisie op te richten binnen haar griffie en dat het de mogelijkheid moet creëren om differentiatie te beargumenteren voor de verzoekers van de gelijkaardige handende zaken. Ten slotte eindigt deze thesis met enkele suggesties voor verder onderzoek.

LIST OF ABBREVIATIONS

CoE	Council of Europe
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
CoM	Committee of Ministers
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CCDH	Steering Committee for Human Rights
CEPEJ	European Commission for the Efficiency of Justice
CCJE	Consultative Council of European Judges
UDHR	Universal Declaration on Human Rights
ICCPR	International Covenant on Civil and Political Rights
FRA	European Union Agency for Fundamental Rights
NHRI	National Human Rights Institution
NGO	Nongovernmental organisation
IBA	International Bar Association
EHRAC	European Human Rights Advocacy Centre
PJP	Pilot Judgment Procedure
WECL	Well-Established Case Law
IAP	Interuniversitary Attraction Poles
ADR	Alternative Dispute Resolution
dd	de dato

LIST OF TABLES AND CHARTS

TABLE OF CONTENTS

I. Introduction

Polyana Valcheva, a member of the bar in Bulgaria tipped the local prosecutor in 2004 that her former spouse had committed possible documentary fraud. During the investigation, she was implicated herself and criminal proceedings were started against both of them. In 2010 she was finally acquitted. In that same year however, she turned to Strasbourg to complain of excessive length of proceedings. Polyana Valcheva was instructed by the European Court of Human Rights in 2013 to re-submit her claim to a Bulgarian court after the State had set up new domestic remedies in execution of the pilot judgments of *Dimitrov and Hamanov v. Bulgaria* and *Finger v. Bulgaria*. After struggling through almost ten years of proceedings – six years in Bulgaria and another four in Strasbourg – Mrs. Valcheva was obliged to start anew from the beginning.[1]

İdris Aşan complained before the Court that the Turkish prison disciplinary board had destroyed one of his letters which was addressed to a newspaper on the grounds that it would stir up trouble because it allegedly contained false statements about the prison that might mislead public opinion. Mr. Aşan's case was also found inadmissible and subsequently sent back to the domestic legal system. The Turkish State had set up a Compensation Commission in execution of the previous pilot judgment of *Ümmühan Kaplan v. Turkey* which was later made applicable to claims such as Mr. Aşan's. Consequently, seven years after his letter was destroyed by the Turkish government, Mr. Aşan still had not been granted relief.[2]

Dimitrov Atanasov and Aleksandar Atanasov Apostolov submitted in their applications of February and March 2017 before the Court that they were being detained in inhuman or degrading circumstances. The Court also found these applications inadmissible for non-exhaustion of domestic remedies and sent the applicants back to the domestic system. The Bulgarian State had created a new preventive and compensatory domestic remedy after the pilot judgment of *Neshkov and others v. Bulgaria*.[3]

At first glance, these persons do not seem to have anything in common. All of their applications however were declared inadmissible by the Strasbourg Court for non-exhaustion of domestic remedies after a previous pilot judgment. A pilot judgment is a procedure used by the Court when it is confronted with a systemic or structural problem in a country, which due to its nature brings with it a large group of victims. This procedure was created in 2004 in order to help the Court deal with large incoming groups of similar applications. It is meant to tackle the

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[1] ECtHR, decision, *Valcheva and Abrashev v. Bulgaria*, application nos. 6194/11 and 34887/11, 18 June 2013; ECtHR, *Dimitrov and Hamanov v. Bulgaria*, application nos. 48059/06 and 2708/09, 10 May 2011; ECtHR, *Finger v. Bulgaria*, application no. 37346/05, 10 May 2011; A. BUYSE, "Flying or landing? The pilot judgment procedure in the changing European human rights architecture" in O.M. ARNARDÓTTIR, A. BUYSE, *Shifting Centres of Gravity in Human Rights Protection. Rethinking relations between the ECHR, EU , and national legal orders*, Routledge, 2016, 101.

[2] ECtHR, decision, *Aşan v. Turkey*, application no; 38453/09, 30 August 2016; ECtHR, *Ümmühan Kaplan v. Turkey*, application no. 24240/07, 20 March 2012.

[3] ECtHR, decision, *Atanasov and Apostotolov v. Bulgaria*, application nos. 65540/16 and 22368/17, 27 June 2017; ECtHR, *Neshkov and others v. Bulgaria*; application nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, 27 January 2015.

underlying problem while safeguarding the efficient functioning of the Court's machinery. As the examples above show however, the use of the pilot judgment procedure can have quite frustrating and seemingly unfair results for the victims of these systemic human rights violations. It could thus be argued that the pilot judgment procedure puts pressure on the position of the applicants of these cases. The tension between the interests of the Court and the interests of the affected victims created by the pilot judgment procedure will be the central theme of this thesis. This thesis has the aim of discovering how both sets of interests are influenced by the use of the pilot judgment procedure. Through the discovery of the functioning in reality of the procedure, this thesis intends to formulate possibilities to improve the pilot judgment procedure from both the viewpoints of the Court and the applicants involved.

A. The pilot judgment procedure: an introduction

Before the design, methodology and structure of this dissertation can be outlined, the pilot judgment procedure must be introduced. To this end, this sub-chapter will offer a first glance at the procedure. It will discuss in broad terms why the procedure was created, how it works and what its consequences are for the applicants involved.

1. Why was the pilot judgment procedure created?

Put simply, the pilot judgment procedure was created as a means for the Court to try to manage its historic backlog. Generally, the Court's caseload in the early 2000's could be divided into two broad categories of cases: 1) unmeritorious cases; and 2) meritorious cases.[4] With the creation of Protocol 14, the Court developed a strategy to do away with this first category of cases quickly and efficiently: the Single Judge procedure.[5] In order to understand this, it is important to know that the Court performs its tasks in different formations: Single Judges, Committees of three judges, Chambers of seven judges and the Grand Chamber of seventeen judges.[6] Generally speaking, these formations deal with cases in an increasing level of complexity. Single Judges have the competence to provide a simple ruling in clearly inadmissible cases using a fast-track procedure.[7] These decisions, which are final, were originally not motivated at all. Recently, the Court decided to start motivating these decisions. Applicants whose cases are found inadmissible will receive a letter detailing the specific grounds of inadmissibility in their case.[8] If there is a more thorough examination needed of the case at hand, the Single Judge will forward it to a Committee or to a Chamber, depending on the complexity of the case. Committees will be charged with the more simple cases. They have the competence to either rule a case inadmissible, or rule it admissible and render a judgment

[4] The Right Honourable The Lord Woolf, *Review of the Working Methods of the European Court of Human Rights*, December 2005, 49. The early 2000's here are taken as the relevant time-frame for broadly looking at the reason for creating the pilot judgment procedure. The procedure was first used in 2004 and came about in the context of reforms at the Court, a process which roughly started in these early 2000's. These reforms will be discussed more in-depth further on.

[5] Article 7 of Protocol 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, Council of Europe Treaty Series – No. 194, 13 May 2004.

[6] The Court consists of 47 judges but there is a rotation system.

[7] Article 27 ECHR.

[8] European Court of Human Rights Press Release, *Launch of new system for Single Judge decisions with more detailed reasoning*, ECHR 180 (2017), 1 June 2017.

on the merits at the same time if the issue at hand is well-known at the court and is thus subject to well-established case law. This procedure is called the Well-Established Case law or WECL procedure.[9] The Chamber then receives the more interesting and complex cases on which there is no established case law yet.[10] The Grand Chamber is tasked with deciding on cases which raise a serious question affecting the interpretation or application of the Convention, or a serious issue of general importance.[11] After a judgment rendered by a Chamber, the parties can further refer it to the Grand Chamber if they are not satisfied with the solution offered. If the case raises a serious question concerning the interpretation of the Convention, the Grand Chamber may accept this referral and examine the case again.[12]

The pilot judgment procedure is a strategy which was created in order to tackle the backlog in the second category of meritorious cases. The Court had noticed that within this group of cases, a lot of its caseload consisted of repetitive cases.[13] These repetitive cases either involved issues on which the Court had already found a violation with respect to a certain Member State, or they represent a wide-spread systemic issue in a Member State leading to multiple similar complaints submitted to the Court. Handling all of these cases separately was deemed to be time-consuming and inefficient. Consequently, the Court decided to entertain these cases simultaneously, through the pilot judgment procedure. A pilot case can either be pronounced by a Chamber or the Grand Chamber, again depending on the complexity of the human rights issue at play.[14] After a pilot case, similar pending cases – if not sent back to the domestic system – can be handled through the WECL procedure at the Committees.

2. How does the procedure work? Case study of the Broniowski case

In the classic scenario, the Court will decide to use the procedure when it is confronted with an inflow of cases which stem from the same systemic issue in one of its States parties. The perfect example here is the first pilot case of *Broniowski v. Poland,* rendered by the Court in 2004. This case was concerned with violations of the right to property of the Bug River people by the Polish State. The issue stemmed from the redrawing of the borders of Poland after the Second World War. Poland was to give a part of its territory which was situated beyond the Bug River to Ukraine, Lithuania and Belarus. The properties were seized by the USSR from the local bourgeoisie, which was Polish and handed over to the peasant population, which consisted of Ukrainians, Lithuanians and Belarusians. In return, Poland received a part of German territory. The Polish citizens once living beyond the Bug river - it is estimated that this were 1 240 000

[9] Article 28 ECHR; the concept of Well-Established Case law will further be explained more thoroughly on page 103.
[10] Article 29 ECHR.
[11] Articles 31 and 43 (2) ECHR.
[12] Article 43 ECHR. Chambers can also relinquish jurisdiction to the Grand Chamber when the cases raises a serious question affecting the interpretation of the Convention or where the resolution of the question involved might have a result inconsistent with a judgment previously delivered by the Court, conform article 30 ECHR.
[13] Council of Europe, *Explanatory Report to Protocol 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention*, Council of Europe Treaty Series – No. 194, 13 May 2004, § 7.
[14] Whether a pilot case was dealt with by a Chamber or the Grand Chamber is indicated in the Chart in Annex 5 on page 219.

persons - were then repatriated to Poland and partly relocated to this territory which had before belonged to Germany. The Polish State agreed to provide a remedy: alternative land and compensation for all people who had their territory seized beyond the Bug River. However, there wasn't enough land in this former part of Germany so that successive Polish governments kept re-enacting this legislation, promising compensation for the Bug River people without being able to act on that promise. Since there were not enough plots in this former German territory, the Polish law had further given the Bug River people a statutory right to obtain compensation through an administrative scheme of bidding for government real property at public auctions: a right to credit rather than a directly enforceable right to financial compensation. Through an administrative decision however, these public lands were never put up for sale. Instead, these public lands were transferred to the local authorities who were not covered by the bidding option, leaving only forest and army land in the hands of the central government. Forest and army land however were mostly excluded from the right to credit. Consequently, this right to credit was an empty promise by the Polish State so that these relocated Polish citizens in reality had never been compensated for the loss of their lands.[15] The Court thus saw these cases coming in and noticed that they had a root in the same issue: this chain of administrative decisions which had barred the applicants from claiming compensation for their loss.

The Court then decided to pick one case, the case of Mr. Broniowski, as an example or 'pilot' case. Mr. Broniowski's grandmother was one of the Bug River claimants who were relocated after the Second World War. His family was compensated with a plot of land. However, it was estimated that the value of the land was only 2% of the land originally held beyond the Bug River.[16] At that moment, there were an estimated 80 000 persons left whose families still were not compensated for the loss of their land after the redrawing of Poland's borders.[17] The other cases stemming from the same issue were kept pending for the duration of the procedure in the *Broniowski* case. Normally, the Court can only decide on the issue at hand with respect to the specific applicant in the case. In this first pilot case however, the Court diagnosed the underlying problem, explained how the State could remedy the issue and subsequently included the obligation for the State to tackle the underlying problem in the operative part of the judgment. This means that remedying the issue in the specific way explained by the Court had become a binding obligation on the State. This in itself was novel in the Court's case law and is still contested.[18] What is important to know is that this 'Broniowski template' was afterwards used for other situations as well and had thus become a part of the Court's procedure. It was

[15] Interview anonymous II; R. DEGENER, P. MAHONEY, "The Prospects for a test case procedure in the European Court of Human Rights" in D. PLAS, M. PUÉCHAVY, *Trente ans de droit européen des droits de l'homme. Etudes à la mémoire de Wolfgang Strasser,* Anthemis, 2008, 175-177.

[16] R. DEGENER, P. MAHONEY, "The Prospects for a test case procedure in the European Court of Human Rights" in D. PLAS, M. PUÉCHAVY, *Trente ans de droit européen des droits de l'homme. Etudes à la mémoire de Wolfgang Strasser,* Anthemis, 2008, 175-176.

[17] R. DEGENER, P. MAHONEY, "The Prospects for a test case procedure in the European Court of Human Rights" in D. PLAS, M. PUÉCHAVY, *Trente ans de droit européen des droits de l'homme. Etudes à la mémoire de Wolfgang Strasser,* Anthemis, 2008, 177; ECtHR, *Broniowski v. Poland*, application no. 31443/96, 22 June 2004, § 162.

[18] the reason why is explained in the part of this dissertation concerning the division of competences between the Court and the Committee of Ministers on page 87.

later termed the pilot judgment procedure and was further codified in 2010 in the Rules of Court.

3. The fate of the follow-up cases

Mr. Broniowski was not the only applicant addressing the Court with a claim based on the systemic issue in Poland. Others had come to the Court as well, and it was foreseen that there were a large group of potential applicants in Poland who could virtually also turn to Strasbourg. The group of duped persons was thus large, consisting of both applicants who had already submitted their claims before the Court and potential applicants who did not (yet) do so. With respect to the group of cases already pending at the Court, the 'Broniowski template' signifies that they will be adjourned until the Court has rendered its decision in the pilot case. Generally, these cases which are kept pending can be dealt with through several avenues:

1. The ideal scenario for the Court is that they are sent back to the domestic system. This can however only happen when the State has a) actually solved the underlying problem;[19] b) has put in place a domestic remedy for all persons in the same position to complain about this problem in the domestic courts and; c) has made this domestic remedy retroactively applicable so that the applicants who had already come to the European Court can in reality use this new domestic remedy to submit their complaint before the national courts. Their applications will then be found inadmissible for non-exhaustion of domestic remedies; or
2. The Court can also decide to allow the State to settle the other pending cases, through a friendly settlement or a unilateral declaration. This is the option normally when the State did put up a solution to the issue nationally, but it did not make the remedy retroactively available to the applicants of the pending cases. It is important to mention here that the Court will only allow friendly settlements and unilateral declarations in pilot cases when the State not only includes a solution with respect to the specific applicant involved in the friendly settlement or unilateral declaration procedure, but also presents a solution for the wider underlying issue. The Court must thus be sure that the issue will not again appear on its list of cases.
3. If a State does not solve the underlying issue, the Court can decide to handle all of the other similar cases through the WECL-procedure. This is the Well-Established Case Law procedure, which, simply stated, means that these will be dealt with by a Committee of Three Judges through a simplified, fast-track procedure. This Committee has the capacity to decide on the admissibility and the merits of a case in one go. Important here is that they only decide on cases which do not raise novel legal issues. They can thus simply apply 'well-established case law'. This is the worst case scenario, because it means that the underlying issue is still there and continues to present a

[19] As will be discussed below starting from page 87 however, the Court has developed a practice whereby it strikes such similar cases out of its list when it has found that the domestic remedy set up in execution of the pilot judgment is appropriate. The underlying issues must thus not necessarily be solved, as long as the applicants can direct their complaints to the newly set-up domestic remedy, instead of the Court.

problem for the Court's caseload. The underlying problem remains, which is detrimental both to the applicants of the cases already at the Court, as well as to other potential future victims subject to the involved Member State.

In the first and the second scenario, the Court will normally let one other case get through. This will be a case coming after the pilot, from an applicant who already had the chance of 'testing' the new remedy or the solution in the home state. This second case will then be used by the Court to see if the remedy set up after the pilot judgment is an effective one. These follow-up decisions thus serve as a control mechanism for the Court.

This is a rough outline of the classic example of a pilot judgment case. As will be described below, the practice has shown to not always fit into this 'Broniowski template'. The Court has treated such cases which show a systemic issue in a given country differently in certain instances. The varying practice of the pilot procedure will be detailed below in "Genealogy of a pilot – a continuum".

B. Relevance and design of the research

1. Critique on the pilot judgment procedure

The pilot judgment procedure has emerged from practice. It was not codified before it was first used by the Court in the *Broniowski* case. Moreover, it does not seem to be the product of the usual political process needed to amend the Convention. Therefore, there was no detailed description of its design and purpose before it was first used. Consequently, it has already been thoroughly discussed in the literature in an attempt to understand the phenomenon better. These commentaries have however predominantly concentrated on the case law and later on its codified version in Rule 61.[20]

[20] Rule 61 is included in annex 10 to this thesis on page 236. Among others, see: V. ZAGREBELSKY, "Violations structurelles et jurisprudence de la Cour Européenne des Droits de l'Homme", *La Nouvelle Procédure devant la Cour Européenne des Droits de l'Homme après le Protocole N° 14* , Colloquium, Ferrara, April 2005 ; L. WILHABER, "Pilot Judgments in Cases of Structural or Systemic Problems on the National Level" in R. WOLFRUM, U. DEUTSCH, *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, International Workshop, Heidelberg, December 2007; R. DEGENER, P. MAHONEY, "The Prospects for a test case procedure in the European Court of Human Rights" in D. PLAS, M. PUÉCHAVY, *Trente ans de droit européen des droits de l'homme. Etudes à la mémoire de Wolfgang Strasser,* Anthemis, 2008; N. FRANGAKIS, "Systemic Human Rights Violations in the Jurisprudence of the European Court of Human Rights", *Nomika Vima (Greek Law Journal)*, 2009; D. T. BJÖRGVINSSON, "The "Pilot-Judgment" Procedure of the European Court of Human Rights" in G. ALFREDSSON, J. GRIMHEDEN, B. G. RAMCHARAN, A. DE ZAYAS, *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Möller*, Martinus Nijhoff Publishers, 2009; P. LEACH, H. HARDMAN, S. STEPHENSON, B.K. BLITZ, *Responding to Systemic Human Rights Violations. An Analysis of 'Pilot Judgments' of the European Court of Human Rights and their Impact at National Level*, Intersentia, 2010; A. BUYSE, " The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges", *Nomiko Vima (Greek Law Journal): European Court of Human Rights - 50 Years*, 2010; M. SUSI, "The Definition of a 'Structural Problem' in the Case law of the European Court of Human Rights Since 2010", *German Yearbook of International Law*, 2012; M. FYRNYS, "Expanding Competences by Judicial Lawmaking: the Pilot Judgment Procedure of the European Court of Human Rights" in A. VON BOGDANDY, I. VENZKE, *International Judicial Lawmaking – On Public Authority and Democratic Legitimation in Global Governance*, Springer, 2012; S. QUESADA, "La genèse de l'arrêt pilote : Maria Athanasiu et autres contre Roumanie" in A. ALMĂŞAN (ed.), *In honorem Corneliu Bîrsan*, Editura Hamangiu, 2013; C. DUBOIS, E. PENNINCKX, *La procédure devant la Cour européenne des Droits de l'Homme et le Comité des Ministres*, Wolters Kluwer, 2016; A. BUYSE, "Flying or

There is one instance of empirical research undertaken partly with respect to pilot judgments. Glas has conducted empirical research on pilots in the context of her doctoral thesis concerning procedural dialogue in the European Convention on Human Rights. Here, the pilot judgment procedure is used as an example of dialogic potential between States, the Court and the Committee of Ministers. The research however is not concerned with how the procedure works in practice and whether it is indeed efficient. It further does not include the perspective of the real and potential applicants.[21] Glas further conducted research concerning the functioning of the pilot judgment procedure in practice based on an analysis of the case law and the appropriate Convention articles and Rules.[22] Until now, there is no thorough investigation of how the procedure works from the inside and whether it is efficient in practice, based on qualitative empirical data.

The literature has further also criticized the pilot judgment procedure for hindering one of the core principles of the European Human Rights System: the right to individual petition as safeguarded in article 34 of the European Convention on Human Rights.[23] As will be argued below, this right to individual petition can be seen as the equivalent of the right to access to justice before the European Court of Human Rights.[24] Looking at the procedure already from afar, it can be questioned how the right to access to justice of the applicants of the cases which are not chosen as the pilot cases comes into play. With respect to the perspective of the applicants, there is again no existing research based on qualitative empirical data looking into how the procedure affect their rights and interests. As the procedure is largely developed through practice and is now growing out of its infancy,[25] there is a need to uncover how it takes form in reality based on the experiences of the persons who have been directly involved with these cases. This doctoral research has the intention to help fill this research gap.

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landing? The pilot judgment procedure in the changing European human rights architecture" in O.M. ARNARDÓTTIR, A. BUYSE, *Shifting Centres of Gravity in Human Rights Protection. Rethinking relations between the ECHR, EU , and national legal orders*, Routledge, 2016; DI MARCO, A., "L'état face aux arrêts pilotes de la Cour européenne des droits de l'homme ", *108 Revue Trimesterielle des droits de l'Homme*, 2016 ; F. FAVUZZA, "*Torreggiani* and Prison Overcrowding in Italy", *Human Rights Law Review*, 2017.

[21] L. GLAS, *The Theory, Potential and Practice of Procedural Dialogue in the European Convention on Human Rights System*, Intersentia, 2016, 243-254.

[22] L. GLAS, 'The Functioning of the Pilot-Judgment Procedure of the European Court of Human Rights in Practice' *Netherlands Quarterly of Human Rights* 1, 2016.

[23] Among others, see: A. BUYSE, " The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges", *Nomiko Vima (Greek Law Journal): European Court of Human Rights - 50 Years*, 2010, 90; J.H. GERARDS AND L. R. GLAS, "Access to justice in the European Convention on Human Rights system", *Netherlands Quaterly of Human Rights*, 2017, Vol. 35(1), 27; DI MARCO, A., "L'état face aux arrêts pilotes de la Cour européenne des droits de l'homme ", *108 Revue Trimesterielle des droits de l'Homme*, 2016, 903; A. BUYSE, "Flying or landing? The pilot judgment procedure in the changing European human rights architecture" in O.M. ARNARDÓTTIR, A. BUYSE, *Shifting Centres of Gravity in Human Rights Protection. Rethinking relations between the ECHR, EU , and national legal orders*, Routledge, 2016, 106; M. FYRNYS, "Expanding Competences by Judicial Lawmaking: the Pilot Judgment Procedure of the European Court of Human Rights" in A. VON BOGDANDY, I. VENZKE, *International Judicial Lawmaking – On Public Authority and Democratic Legitimation in Global Governance*, Springer, 2012, 361.

[24] For this argument see "The right to individual application as protected under article 34 of the ECHR."on page 141.

[25] This argument can be found in the conclusion starting from page 194.

2. The IAP Project

a. The Human Rights Integration Project

The doctoral research originates in an overarching research project entitled 'The Global Challenge of Human Rights Integration: Towards a User's Perspective'. It is funded by the Interuniversity Attraction Poles (IAP) Programme created by the Belgian Science Policy Office.[26] The central goal of this project is to study the fragmented architecture of human rights law as an integrated approach from a user's perspective.

Within the confines of the IAP project, this research is situated within its work package 5. The package is meant to examine the procedural dimension of human rights integration in order to optimize access to international human rights mechanisms. Its focus is on reconciling the interests of international complaints mechanisms for an improved efficiency with the importance of optimal accessibility to them for their users. Particular attention is paid here to solutions and strategies developed within one system that could benefit others.[27]

b. User's perspective

This doctoral research focusses mostly on the second prong of the overarching research project, it will primarily look at the pilot judgment procedure from a user's perspective. In order to frame this research correctly, it is however important to explore what a user's perspective entails.

Adopting a user's perspective shifts the analytical focus to the viewpoint of one or more users of human rights, in contrast to looking at a specific document or issue.[28] This is what Desmet has labelled an empathic approach. It requires the researcher to adopt an insider's perspective based on experience with the practice of human rights.[29] Desmet identifies four characteristics of adopting this empathic user's perspective. First, it will result in a context-specific exploration of a given human rights issue. Context is important to understand the evolutions and practical translation of a given legal norm.[30] Second, looking at human rights from within will more directly uncover the complexities of the multi-layered human rights architecture. Resulting from the fragmented nature of human rights law, a user will be confronted with a multitude of sources applicable to his or her specific use of human rights.[31] Third, the employment of a user's perspective is based on a social-constructivist understanding of human rights. This entails that law in general, and human rights law specifically, is viewed as a living thing that is shaped and

[26] See http://hrintegration.be.
[27] See http://hrintegration.be/work-package/optimizing-access-international-human-rights-mechanisms-ugent.
[28] E. DESMET, "Analysing Users' Trajectories in Human Rights", *Human Rights & International Legal Discourse*, 2014, 122.
[29] E. DESMET, "Analysing Users' Trajectories in Human Rights", *Human Rights & International Legal Discourse*, 2014, 124.
[30] E. DESMET, "Analysing Users' Trajectories in Human Rights", *Human Rights & International Legal Discourse*, 2014, 124.
[31] E. DESMET, "Analysing Users' Trajectories in Human Rights", *Human Rights & International Legal Discourse*, 2014, 124.

realized through its use.[32] Lastly, and most importantly for this doctoral research, adopting a user's perspective ultimately leads to questions about the effectiveness of human rights law as a system. When viewing human rights from the perspective of its users, it becomes clear that they are confronted with numerous challenges in realizing their rights.[33] In this context, it may be important to point to the critique of Arendt on the idea of universal human rights. She argues that human rights are intrinsically linked to States that provide a space where rights can be claimed. When States do not create this space and ignore a primordial 'right to have rights', the persons who fall under these jurisdictions become in fact 'rightless'.[34] This undoubtedly leads to the realization that when it comes to human rights, we cannot just accept access to justice as a given.[35] Consequently, research adopting a constructive user's perspective, must pay special attention to the capabilities of these users, what they can actually do and be,[36] and the difficulties they experience in exercising their rights.[37]

Desmet has defined 'human rights user' as" (…)any individual or composite entity who engages with (uses) human rights".[38] This definition reveals that the scope ratione personae, as well as ratione materiae is to be interpreted broadly. It does not only encompass human rights law but also the two other interrelated dimensions of values and good governance. This means that human rights law must be seen in an interrelated context of moral values and rule of law principles. As to the scope ratione personae, the definition includes individuals and any formal or informal composite entity. The perspective used here is thus inclusive. This however runs the possible risk of equalization, through which all users are considered similar, resulting in a lack of nuance. Therefore, in order to effectively employ this perspective, it is paramount that this inclusivity is approached in a differentiated manner.[39] Based on the different ways in which human rights can be used, Desmet has identified four categories of human rights users.[40] Direct users engage with human rights immediately, by invoking them – the applicants for instance - or giving effect to them – such as States. Indirect users come into contact with the use of human rights more distantly, by way of supporting or imposing the implementation of these rights.[41] Supporting users can for instance be human rights NGO's who act as intermediaries in order to

[32] E. DESMET, "Analysing Users' Trajectories in Human Rights", *Human Rights & International Legal Discourse*, 2014, 125.
[33] E. DESMET, "Analysing Users' Trajectories in Human Rights", *Human Rights & International Legal Discourse*, 2014, 125.
[34] H. ARENDT, *The Origins of Totalitarianism,* Harcourt, 1968, 296; M. BAUMGÄRTEL, "Unpacking a Concept for Human Rights Research", *Human Rights & International Legal Discourse*, 2014, 147.
[35] M. BAUMGÄRTEL, "Unpacking a Concept for Human Rights Research", *Human Rights & International Legal Discourse*, 2014, 151.
[36] M. C. NUSSBAUM, "capabilities as fundamental entitlements: Sen and Social Justice", *Feminist Economics*, 2003, 33.
[37] M. BAUMGÄRTEL, "Unpacking a Concept for Human Rights Research", *Human Rights & International Legal Discourse*, 2014, 143.
[38] E. DESMET, "Analysing Users' Trajectories in Human Rights", *Human Rights & International Legal Discourse*, 2014, 126.
[39] E. DESMET, "Analysing Users' Trajectories in Human Rights", *Human Rights & International Legal Discourse*, 2014, 127.
[40] E. DESMET, "Analysing Users' Trajectories in Human Rights", *Human Rights & International Legal Discourse*, 2014, 128-129.
[41] E. DESMET, "Analysing Users' Trajectories in Human Rights", *Human Rights & International Legal Discourse*, 2014, 129.

help victims vindicate their rights. Users imposing the implementation of human rights can be typified as judicial users, meaning the judges and Court staff analysing the rights claims brought to them by alleged victims.

Employing a user's perspective opens up a range of possibilities concerning the design of the research. It is possible to study a subject from a single, dual or multiple user's perspective. This methodological choice will ultimately impact the nature of the findings.[42] A wide, multiple user's perspective will lead to a more balanced representation of the issue, while a single user's perspective can provide a more in-depth analysis of one particular user of interest. When choosing to look into a category, it will also be important to concentrate on the diversity within the category. Otherwise, the researcher runs the risk of obscuring power, economic, cultural and social differences within one of these categories.[43] Adopting a user's perspective creates the opportunity of looking at the interaction of different users, who naturally approach a certain issue differently.[44] Lastly, the research topic can be broadened to include the perspective of the potential user. They are in a position where they could use human rights but have not (yet) decided to do so.[45]

Directing research towards these issues in turn raises questions concerning the capabilities of users and possible inhibiting factors.[46] Here, the Arendtian critique on universal human rights can again be looked at.[47] Taking this critique seriously, it is paramount that a user's perspective also includes vulnerable individuals. A user's perspective may however mitigate the Arendtian critique in that it can show under which circumstances and conditions marginalized groups and individuals may effectively mobilize human rights.[48] Secondly, the user's perspective framework can be studied from structuralist social theories which challenge the idea that users are autonomous agents, who act independently of their environment.[49] Adopting a user's perspective must thus be sensitive towards structural issues whose relevance depend on contextual elements, such as the user in question, the right studied, national/regional setting, and culture. Empirical research can help reveal if and how these structural issues play in a given context.[50]

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[42] E. DESMET, "Analysing Users' Trajectories in Human Rights", *Human Rights & International Legal Discourse*, 2014, 136.
[43] E. DESMET, "Analysing Users' Trajectories in Human Rights", *Human Rights & International Legal Discourse*, 2014, 137.
[44] E. DESMET, "Analysing Users' Trajectories in Human Rights", *Human Rights & International Legal Discourse*, 2014, 137.
[45] E. DESMET, "Analysing Users' Trajectories in Human Rights", *Human Rights & International Legal Discourse*, 2014, 137.
[46] E. DESMET, "Analysing Users' Trajectories in Human Rights", *Human Rights & International Legal Discourse*, 2014, 138.
[47] M. BAUMGÄRTEL, "Unpacking a Concept for Human Rights Research", *Human Rights & International Legal Discourse*, 2014, 147-151.
[48] E. BREMS and E. DESMET, "Studying Human Rights Law From The Perspective(s) of its Users", *Human Rights & International Legal Discourse*, 2014, 112.
[49] M. BAUMGÄRTEL, "Unpacking a Concept for Human Rights Research", *Human Rights & International Legal Discourse*, 2014, 151-156.
[50] M. BAUMGÄRTEL, "Unpacking a Concept for Human Rights Research", *Human Rights & International Legal Discourse*, 2014, 156.

c. Work Package 5: Optimizing access to international human rights mechanisms

The Human Rights Integration project was split up into seven work packages, divided among the different partners of the project. Work Package 5 was – among others - assigned to Ghent University and encompassed the following project description:

> *"Work package 5 will examine the procedural dimensions of human rights integration, with a focus on international complaint procedures. While monitoring bodies such as the European Court of Human Rights and the Inter-American Commission and Court on Human Rights are confronted with mounting or even huge amounts of incoming petitions, individual petitioners and in particular members of vulnerable groups still experience practical and legal obstacles hindering them to effectively pursue cases of alleged human rights violations. The research will formulate clear-cut and substantiated proposals reconciling optimal access with the need of procedural efficiency and an efficient management of incoming cases. Particular attention will be paid to examining to what extent solutions and strategies developed within one system (also beyond the regional mechanisms) may benefit another."*[51]

The pilot judgment procedure was created in the context of the Court's tackling of its historic backlog. One of the reasons for its conception was indeed procedural efficiency and one of the main criticism launched at the procedure is that it would weaken the position of the applicants in terms of their right to individual petition. This research firstly tries to evaluate the procedure in the light of these two presumptions: is the pilot judgment procedure indeed efficient and does it harm the applicants' right to access to the Court? Secondly, based on this evaluation, this research will aim to formulate proposals to ameliorate the procedure with respect to the two normative goals of procedural efficiency and access to justice. The research thus fits well within work package 5.[52]

d. The pilot judgment procedure in the context of the IAP project

This doctoral research focusses strongly on efficiency, in the context of procedures at the European Court of Human Rights. It acknowledges that access to justice is not evident here, certainly not in the context of the overburdening of the Court, the Council of Europe's answer to these issues, and more specifically the creation of pilot judgments. The research is conceptually looking at the difficulties that different users experience, both on the side of the processing of the incoming cases, or on the side of accessing the Court. Its main goal is to mitigate these hurdles from both perspectives.

The research further employs a multiple user's perspective. It will direct its attention firstly towards NGO's who can act both as direct users, by invoking human rights, or as indirect users, by supporting these rights of others. Secondly, it will focus on judicial users, who can be

[51] Human rights Integration, Work Package 5: Optimizing access, available at: http://hrintegration.be/work-package/optimizing-access-international-human-rights-mechanisms-ugent.

[52] The focus on vulnerable groups of applicants is not thoroughly discussed in this research. As will be discussed below starting from page 171, the empirical research conducted in the framework of this doctoral research has shown that vulnerability is not a factor which plays a role in the context of the pilot judgment procedure.

categorized as indirect users by imposing human rights. Lastly, it can be argued that this doctoral research should focus on the potential applicants themselves, instead of NGO's. It is however methodologically difficult to predict who these potential applicants would be in the future. Focusing on NGO's that have an established practice in introducing bulk cases at the European Court of Human Rights can arguably provide a more representative result. Interestingly, it can be argued that the Court itself also has employed a multi-user's perspective to look at itself in the context of the reforms of the European Human Rights system. More specifically, during the Oslo Conference in 2014, the Court studied itself from an inside perspective and invited experts to offer an outside perspective.[53]

Thirdly, seeing that the research will be carried out to focus on the perspective from within, the use of empirical research methods, and specifically of qualitative empirical methods, is arguably necessary.

3. Research questions

As a result of the existing literature and the questions raised therein, combined with the framework provided by Work Package 5, this research will essentially centre around four research questions.

Firstly, this dissertation will outline how the current system of the pilot judgment procedure is working in practice. The pilot procedure has emerged from practice, leaving legal uncertainty as to how it works. This problem has partly been addressed with the codification of the procedure in Rule 61 of the Rules of Court. However, there is a widely varying practice concerning the use of the pilot judgment procedure which results in a persisting uncertainty. This dissertation will therefore firstly map the whole of the pilot judgment procedure.

Secondly, the research will look at the pilot judgment procedure from the viewpoint of procedural efficiency, thereby focussing on the viewpoints of the procedure's users at the side of the Court. How do they work with this procedure and how do they tweak it in order to use it efficiently? What factors do they take into account and how do they weigh in their decisions?

Thirdly, the pilot judgment procedure will be studied from the viewpoint of the users at the side of the victims of these large-scale human rights violations. How does this procedure work in terms of access to justice? Does or doesn't it hinder this right in practice and on which levels? This research project thus aims at carrying out a thorough evaluation of the pilot judgment procedure from two viewpoints, in order to find its strengths and weaknesses from these perspectives.

Fourthly, based on this assessment of strengths and weaknesses, this dissertation will aim to formulate means to improve the existing system. These proposals for improvement will be inspired by the two viewpoints of procedural efficiency and access to justice. The aim of this study is however primarily on identifying the difficulties faced by the two groups of users of the pilot judgment procedure. These proposals will thus remain on the surface, making

[53] Conference on the long-term future of the European Court of Human Rights, Session I – History, reforms and remaining challenges, Oslo, 7 April 2014, 27-48.

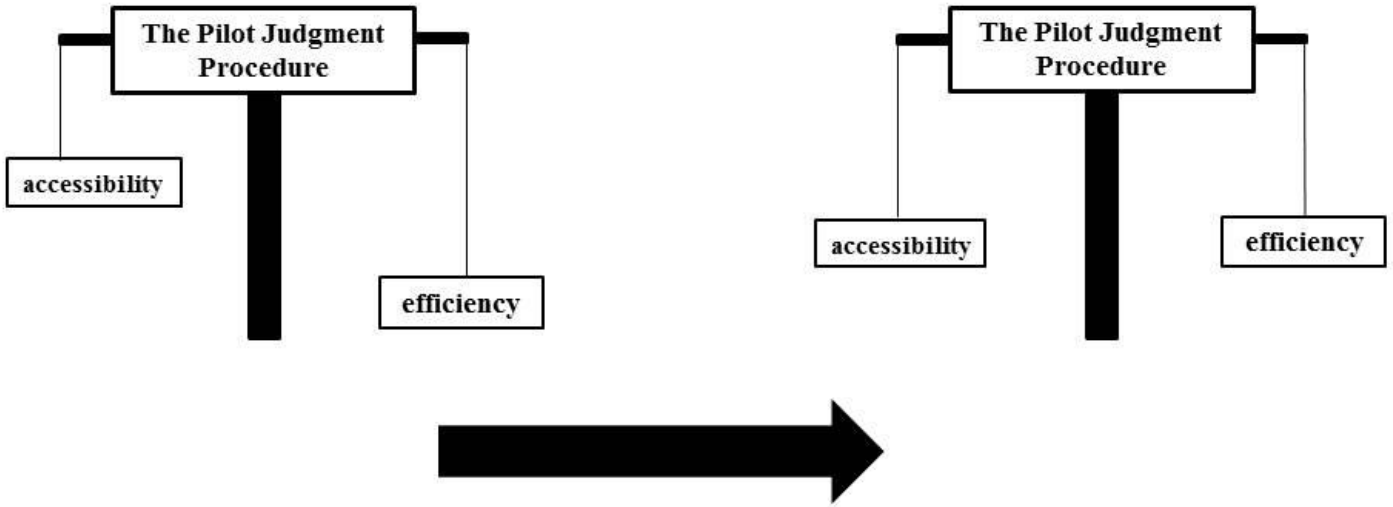
suggestions for improvements based on comparable aggregate claims procedures or further research.

It must be emphasized that it is not this dissertation's aim to propose the creation of a new procedure. This is a conscious choice for several reasons. Firstly, it is a pragmatic choice. Working out a wholly new system would simply not be feasible in the confines of this research project, both as to time as well as to resources. This could however be an avenue for further or alternative research. Secondly, the pilot judgment procedure is a new evolution which was created by the Court itself. Although there's not always a paper trail to this evolution, the procedure was created by the judges to fulfil a need that was there at the relevant time. In the meantime, the procedure has been codified in the Rules of Court and although it is still somewhat contested, it has now become an integral part of the European Human Rights System. The interviews conducted at the European Court of Human Rights in the context of this doctoral research further indicate that the persons working with the procedure evaluate it positively. It thus seems as if the procedure is here to stay. Therefore, to change this is not feasible. Contrarily, clarifying the inner workings of the procedure while further proposing changes meant to have a positive effect on the use of the procedure for both the Court and the applicants is an achievable goal.

In conclusion, the research questions around which this dissertation is built are four-fold:

1) How does the pilot judgment procedure work in practice?
2) Is it procedurally efficient?
3) Is it accessible for the applicants involved?
4) If necessary, how can we make the procedure both efficient, while also accessible to the applicants?

The following is a schematic representation of the goal of this doctoral research and the steps taken towards this goal:



Research steps undertaken:

1) How does the pilot judgment procedure work in practice?
2) Is it procedurally efficient? Which parameters are important for the procedure to be efficient?
3) Is it accessible? Which parameters are important for the procedure to be accessible?
4) How do we make the procedure both efficient, while also accessible to applicants?

C. Methodology

1. Mixed Research Methods

The methodology applied in this dissertation consists of a combination of traditional legal research methods and socio-legal research. During the first stage of the research, the focus was placed on classical desk study of the topic in general and the demarcation of the research. Due to the design of the research questions and the topic itself, the research then moved on to the collection of empirical research data. The pilot judgment procedure was born out of practice with the specific goal of ameliorating the Court's efficiency. Notwithstanding the fact that it is now part of the Rules of Court, analysing the cases has clarified that the practice of the procedure is still evolving. As a result of this, the practical implementation of the procedure is the focal point in answering the question whether the procedure is indeed efficient. In order to address this question, it is important to look at the experiences of the persons who are working with it. Additionally, the procedure has been critiqued to hinder the right to individual application of actual and potential victims of large-spread human rights violations. This again, is also a question which goes to the heart of the experiences of the persons who are involved in these mass cases and have tried to reach the Court.

Consequently, in order to find an answer to the research questions whether the pilot judgment procedure is in practice efficient as well as accessible, the experiences of both the lawyers and judges at the European Court of Human Rights and the lawyers bringing cases involving wide-spread human rights abuses to this Court were imperative. The interview topics were designed in the first stage of the desk study and were divided into overarching themes, selected on the basis of the literature study. For the questions concerning procedural efficiency, the parameters developed by the Council of Europe's own European Commission for the Efficiency of Justice (CEPEJ) were taken as the basis. With respect to access to justice, inspiration was primarily drawn from the Court's own case law and procedural justice theory. The researcher thus employed a deductive methodology, in which the research started from the literature, through which hypotheses were developed which were then later tested. This desk study further involved research with respect to methodology itself. As the researcher did not have experience in the field of socio-legal research, a lot was still to be learnt. In this context, the researcher also followed a specialist course in the Doctoral Schools program geared towards elite interviews.

The desk study further resulted in a series of charts and tables created by the researcher on the basis of publically available information. On the one hand, the researcher synthesized the existing contentieux on full and quasi-pilots between 22 June 2004 – the date of the first pilot of *Broniowski* – and end of 2017. The case of *Burmych v.Ukraine*, although not strictly a pilot case, will also be discussed in this thesis. It has however shifted the landscape of pilot judgments. As a result, a thesis concerning pilots would not be complete without the inclusion of the *Burmych* case. These tables were created in order to abstract the whole of the case law and to enable theory to emerge from it. They further include a brief explanation on the facts of the cases. These facts are only included in the text of this thesis when necessary. If the reader however is interested to find out more about a certain case in this thesis, the information can be found in the tables made available in the annexes. On the other hand, the researcher created

charts based on the statistics made publically available by the Court, in order to provide the reader and herself with a visual representation of this data.

The researcher further reserved the possibility for new themes to emerge from the interviews, being aware that not everything could have been covered in the desk study. This empirical data indeed showed a range of factors which were not apparent from the initial literature study. The researcher allowed for this and employed the basic principle of grounded theory of letting the theory emerge from the data. After the interview stage, a rough coding of the interviews took place. Coding was conducted in an unscripted manner, whereby the researcher opted for an inductive research method based on grounded theory. The literature and pilot cases relevant to the topic were then also roughly coded along the lines of the concepts that emerged from this first coding of the interviews. Subsequently, a first wave of writing took place based on the literature, after which the interviews were coded for a second time. It is only after this second stage of coding of the interviews, that the interviews themselves were included in this thesis.

2. Selection of target groups and conducting the interviews

The researcher conducted twenty nine semi-structured interviews with two groups of elite stakeholders involved in the pilot judgment procedure. Nineteen respondents were interviewed on the side of the Court in January 2017. Both the themes of access to justice and efficiency were discussed during the interviews with the Registry lawyers and judges at the Court. Ten interviewees participated at the side of the applicants' representatives.[54] The theme of access to justice was focussed on more prominently during the interviews with the lawyers and non-governmental organizations that bring these kinds of large-scale cases to the Court. For the purpose of this thesis a non-governmental organization or NGO is defined as any type of organization that is formally free from governmental intervention and that does not wield governmental power.[55] These interviews were conducted in February and March 2017. Efficiency at the Court sometimes was discussed with this target group as well. However, as will be explained, the Court has control concerning the application of the procedure and has the general overview concerning its own functioning. Consequently, knowledge concerning the efficiency and inner workings of the procedure is primarily present at the Court resulting in the fact that efficiency was more thoroughly discussed with the respondents at the Court.

Initially, Judges and Registrars were selected on the basis of their experience with pilot cases. Other Registry lawyers could not be selected from the desk study because it is not made public which lawyer worked on which case. The researcher contacted all Judges and Registrars who had worked on at least four full pilot cases. The majority of selected persons reacted positively, a minority expressly declined or never reacted. Additionally, once arrived at the Court the researcher used snowballing, with the help of a gatekeeper. This enabled the researcher to also include Registry lawyers in the interviews. Therefore, in order to find and contact these persons, a contact on the inside of the Court was imperative to create a big enough sample of

[54] The list of Interviewees is included in Annex 1.

[55] A. PETERS, "Membership in the Global Constitutional Community" in J. KLABBERS, A. PETERS AND G. ULFSTEIN (eds.), *The Constitutionalization of International Law*, OUP, 2009, 218.

interviewees in Strasbourg. The other side of the coin is, however, that the researcher was not able to completely control her sample as it was partly given form through this gatekeeper and other interviewees who suggested people to talk to. All but one of these interviews took place in the offices of the Court in Strasbourg. One interview was conducted over email, in which the respondent answered questions in a written form.

With respect to the second group, the researcher selected these lawyers and organizations as the respondents instead of the actual and potential applicants who could bring such cases to the Court. There are two main reasons for this selection. Firstly, the nature of the cases involved made interviewing real and potential applicants virtually impossible. Pilot judgments by their very nature encompass an enormous number of involved persons, as they are geared towards cases exemplifying a structural or widespread issue in a given country in the Council of Europe. The first pilot judgment, *Broniowski v. Poland*, involved some estimated 80,000 persons in a similar situation. At the time of the judgment, there were 167 similar cases pending before the Court. Currently, there are 28 full pilot cases.[56] It could be argued that the research could have employed a case study methodology, looking at one specific case. However, looking at the case law involving the pilot judgment procedure, it is abundantly clear that the practice differs. Looking at only one case, even though in-depth, would not create a situation in which the researcher could make assertions about the efficiency and accessibility of the procedure as a whole. In order thus to make the research practically feasible while at the same time encompass a larger sample of all pilot cases involved, the researcher opted to interview the lawyers and organizations who had brought these large-scale cases to the Court or were involved through third party interventions.

Secondly, the lawyers and human rights organizations involved in these cases were hypothesized to hold a more contextual view on these cases. Human rights lawyers and organizations include the general situation in their framing of the case before the European Court of Human Rights. They may even bring a certain case before the Court in the context of strategic litigation.[57] As such, they are in the ideal position to offer a broad perspective on the inner workings of the procedure, while still focussing on the interests on the side of the applicants. Furthermore, in looking at the case law with respect to the pilot judgment procedure, it is clear that these kinds of lawyers and organizations are often involved.[58] They may thus be playing an important role in the development of the pilot judgment procedure.

All lawyers and human right organizations that had worked on a pilot or a quasi-pilot case were contacted.[59] The initial selection thus did not solely look at possible respondents involved with full pilot cases. The Court has control concerning the application of the procedure and as will be explained below starting from page 37, this decision is not always completely clear. As a result, these lawyers and organizations might have had the intention to bring a pilot case before

[56] A detailed overview can be found in Annex 5 on page 219.
[57] The concept of strategic litigation is discussed below on page 174. For the purpose of this thesis, it is defined as a form of public interest litigation where a case is pursued on behalf of an applicant or group of applicants, with a view to achieving a law reform goal beyond the individual case.
[58] In 5 of the 28 full pilot cases and in 7 out of 19 quasi-pilot cases.
[59] The NGO's and their affiliation to a certain case are detailed in Annexes 7 – 9 starting from page 226.

the Court, while the Court ultimately decided not to apply the procedure. The initial access to the Court in the form of framing of the case in this hypothesis was done with the pilot judgment procedure in mind, making these respondents equally interesting in the framework of this doctoral research. Again, not all of the contacted persons agreed. A minority declined or never reacted. As these lawyers and organizations are spread across Europe, these interviews were conducted through Skype. There are two exceptions to this, as these respondents were accessible for a face-to-face interview.

The interviewees expressed a wide range of choice as to the modalities of the interview and how the material was going to be used. A minority of respondents indicated that they wanted to remain anonymous. A majority of respondents preferred to be named as one of the respondents but did not wish for their input to be linked to their names. A small minority of interviewees mentioned that they would not mind to be quoted, a practice which the researcher decided not to do in order to ensure equality and consistency among respondents. The quotes eventually used in the dissertation were only slightly altered in order to increase legibility by translating spoken to written language.

Some respondents did not want to be recorded, a majority did not mind provided that the recordings would be eliminated afterwards. Some interviewees indicated that they wanted to say some things off the record, other remained formal and did not share such information. Some interviewees wanted to see the transcript of their interview, others did not. One respondent made changes as to language: no alterations were made to the content but made the text more readable. Another respondent also changed the transcript in order to weaken the strength of the language used.

In reporting, the respondents at the Court who wished to remain anonymous were referred to as such in the footnotes. As the snowball method was used at the Court, other persons might be aware when the interview took place with these persons. It was thus not possible to guarantee anonymity while indicating the date of the interview in the footnotes. Therefore, they are referenced to as ‘anonymous I’, ‘anonymous II’ and ‘anonymous III’. With respect to the lawyers, one interviewee first indicated to wanting to be included in the list of interviewees but later wished to remain anonymous. As there was no snowballing used whereby any other person could know when this interview took place, this interview is referenced in the normal fashion ‘Interview dd X.X.XXXX.’

3. Limitations and problems faced

In the course of the interviews, it became clear that it would have been interesting in order to look at the issue of the pilot judgment procedure in the context of accessibility and efficiency for the researcher to also talk to State representatives at the Committee of Ministers. In order to look at the complete picture whereby all primary actors – meaning Court, applicants and States – are equally taken into account. The States’ perspectives were never part of the original design of this research project, following the framing of the research within WP5 of the IAP Project. This thesis circles around the normative goals of efficiency and accessibility, two interests which the researcher attributed to the Court and the applicants respectively. It is only during the course of the research that it became clear that the States’ willingness to cooperate would

play such a primordial role in both. The researcher however opted to remain with the original design of the research. This third perspective could however be an interesting avenue for further research.

Lastly, since the judgment in *Burmych and others v. Ukraine* which came out on 12 October 2017, the landscape of pilot judgments has considerably changed.[60] Here, the Court was confronted with a State reluctant to execute a previous pilot judgment, which resulted in a constant influx of similar cases on its docket.[61] As a result, the Court found that it had fulfilled its duty based on the Convention: it had found a violation and had identified the source as being a systemic problem of non-execution of domestic judgment. It had further instructed the State to address the underlying systemic problem. According to the Court, this is where its task under the Convention ends. As a result, the Court decided that it would not render judgment in these pending cases. Instead, it would strike these cases out of its docket and usurp them in the execution process of the previous pilot judgment before the Committee of Ministers. This thus means that the Court is not going to entertain these cases. Instead, a violation is supposed and these applicants can just skip a step and go directly to the Committee of Ministers which is now tasked with dealing with all of these cases. During the interviews at the Court, the researcher was at several instances instructed to await this judgment. The lawyers and judges at the Court working with the pilot procedure were aware that there was a problem of mass non-execution of a pilot judgment and that this case was at that time pending before the Grand Chamber. One respondent even signaled that this Burmych case would be as important as the first pilot of Broniowski.[62] What the outcome would be however, was not divulged.

The Burmych indeed is of crucial importance in the context of pilot judgments. It does however not impact the validity of the research carried out. The solution proposed in Burmych is geared towards cases where the involved State is manifestly unwilling to execute a previous pilot judgment. This is a specific and exceptional situation and thus does not impact the validity of this research. In the aftermath of Burmych, it would however be interesting to know how the lawyers and NGO representatives regard this evolution in the case law. Specifically, it could be argued that this might make their work easier. The violation is taken as a given and the case is automatically brought to the Committee of Ministers. Access to a court is not even necessary anymore, the applicants are automatically directed to the next step. This might be seen as a pragmatic view. On the other hand, there is no access to a court anymore. The Committee of Ministers is a political body which is not designed to take the individual situation of an applicant into account.[63] From a more principled position, it could be argued that this way of working does not qualify as justice for the victims, as there is no longer an independent judicial body examining the case.

[60] ECtHR, *Burmych and others v. Ukraine*, application nos. 46852/13 et al., 12 October 2017.
[61] At the time of the judgment, there were 12 143 similar cases pending at the Court.
[62] Interview III dd 13.01.2017.
[63] This point will be more thoroughly discussed below starting from page 91.

D. Structure of the dissertation

This first chapter has created the framework within which this research has taken place. It has introduced the pilot judgment procedure and explained the relevance of the research conducted. Further, the design of the research was set out and the methodology clarified.

The second chapter will offer a thorough examination of the pilot judgment procedure from the inside out. As explained, the procedure was created through practice. Consequently, there is still a lot of uncertainty both inside and outside of the Court as to what it is, where it originated from and how it works. This first chapter aims to answer these questions in order to create a holistic view of the procedure. This will serve as the basis for the subsequent chapters concerning procedural efficiency and access to justice.

The third chapter will discuss the pilot judgment procedure from the perspective of procedural efficiency. To this end, the concept of procedural efficiency will first be demarcated in order to subsequently operationalize it in the context of this dissertation. The chapter will move on to include the findings of the empirical research carried out at the Court. It will end with a conclusion to the research question whether the pilot judgment procedure is efficient.

The fourth chapter then turns to the perspective of access to justice; The first two sub-chapters aim to define the concept of access to justice before it is operationalized in the context of this dissertation. A fourth sub-chapter subsequently presents the findings from the qualitative empirical research carried out both at the Court as with the representatives of the applicants. The chapter ends with a conclusion answering the research question of whether the pilot judgment procedure is accessible.

The fifth chapter brings both perspectives together as the interviews have shown that execution of the general measures indicated in the pilot judgment is a necessary condition for both procedural efficiency and accessibility. This chapter will thus zoom in on the question whether the problem was solved by looking at State execution of these pilot judgment. In doing so, the chapter will aim to assess success in pilot cases.

The last and sixth chapter brings us to a conclusion and aims to answer the question whether the pilot judgment procedure is both efficient as well as accessible to the victims of these systemic human rights violations. In the chapter, the elements which raise difficulty are being diagnosed and certain points for improvement are raised.

II. The Pilot Judgment Procedure: taking a closer look behind the scenes.

In this chapter, the pilot judgment procedure will thoroughly be discussed, based on the case law and on the experiences of the judges and Registry staff at the Court. In a first sub-chapter, it will be shown that thé pilot judgment does not exist. Pilots and pilot-like cases are instead placed on a continuum, ranging from the classic Broniowski template to cases where the Court identified a systemic issue but did not attach a procedural consequence to this. A second sub-chapter will explain how the Court then selects a pilot case. This decision entails two steps: firstly, the decision which situations warrant the application of the pilot judgment procedure; and secondly, the decision which case stemming from the underlying problem will serve as the example case. Further, the pilot judgment procedure was created from practice and seems to emerge out of nowhere from the outside perspective. In a third sub-chapter therefore, the origins of this procedure will be traced. In a fourth sub-chapter, the procedure will be put in the wider institutional context of the Council of Europe. A last and fifth sub-chapter will conclude based on the above evolutions what the pilot judgment procedure looks like now.

A. Genealogy of a pilot – a continuum

The pilot judgment procedure is an innovative procedure created by the Court in 2004 with the case of *Broniowski v. Poland*.[64] When reduced to its very core it can be described as a procedure whereby an individual case or a combination of cases, classified by the Court under priority treatment, is used by the Court to diagnose a structural problem in the respondent State and gives instructions to that State as to how to remedy the issue.[65] Through this one case the Court seeks "to achieve a solution that extends beyond the particular case or cases so as to cover all similar cases raising the same issue".[66] In other words, the chosen case will serve as a magnifying glass for the Court to discuss a wider issue in one of its Contracting States, which is at the base of human rights violation at hand.

The reality of the pilot judgment procedure is however a bit more complex. The Court will indeed try to provide a thorough diagnosis of the wider issue. It will also provide some suggestions as to the measures that could be taken by the State to remedy the problem, and most importantly, it will include the obligation to take general measures in the operative part of the judgment. This means that in principle, this obligation has now become binding upon the respondent State.

Furthermore, the wider systemic issue which the Court is trying to remedy through these pilot judgments in most cases brings with it a group of similarly situated applicants. In most pilot cases, these similar applications are kept pending. The Court will not render a judgment. Instead, these applicants wait until the involved State has executed the requested general

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[64] ECtHR, *Broniowski v. Poland*, application no. 31443/96, 22 June 2004. As explained above starting from page 2.

[65] A. BUYSE, "The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges", *Nomiko Vima (Greek Law Journal): European Court of Human Rights - 50 Years*, 2010, 78.

[66] European Court of Human Rights, *The Pilot-Judgment Procedure – Information note issued by the Registrar*, available at: http://www.echr.coe.int/Documents/Pilot_judgment_procedure_ENG.pdf.

measures, which in most cases involves the setting up of a domestic remedy. These cases are then generally sent back to the national legal system, so that they can be dealt with domestically.

Former Judge and Registrar[67] at the European Court of Human Rights, Paul Mahoney has explained clearly what the pilot judgment procedure essentially did in the context of the *Broniowski* case:

> *"The Broniowski judgment essentially contained two elements on the issue of execution. The Government were told: firstly, you have to eliminate the source of the violation, that is for the future, and secondly, you must provide a remedy for past prejudice that has been suffered by not only the individual applicant but also all the other 80000 Bug river claimants adversely affected by the systemic violation found."*[68]

The procedure has however evolved with time and under the influence of the cases that have come before the Court. The strict conception of what a pilot judgment entailed in *Broniowski* has changed, a sort of 'continuum' has formed. This continuum of cases dealing with human rights issues which go beyond a mere individual violation entails grossly three categories of cases: the strict 'full' pilot judgment procedure, the quasi-pilots and cases in which there is mention of a systemic issue but the Court does not attach any procedural consequence to this.

1. <u>The 'full' pilot</u>

In order to know how the procedure works, it is necessary to understand what it entails. This is a crucial step leading to the question in the next sub-chapter when and how the Court will decide to apply the procedure. Even within the category of full pilot cases, there are a range of different views on what a pilot is, varying from very strict to more liberal approaches.[69]

The most strict definition can be found with Wildhaber, President of the Court at the time of the *Broniowski* case, who posed that a full pilot case consists of eight characteristics:[70]

(i) the Grand Chamber of the Court finds a violation of the Convention in the form of a systemic problem affecting an entire class of individuals in a similar situation;

(ii) the Court concludes that this systemic problem may give rise to numerous subsequent applications;

(iii) the Court indicates general measures needed to remedy the issue;

(iv) the Court acknowledges that these measures should apply retroactively;

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[67] Mr. Mahoney was Registrar of the Grand Chamber in the Broniowski case.

[68] P. MAHONEY, "Discussion Following the Presentation by Luzius Wildhaber" in R. WOLFRUM, U. DEUTSCH, *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, International Workshop, Heidelberg, December 2007, 85; R. DEGENER, P. MAHONEY, "The Prospects for a test case procedure in the European Court of Human Rights" in D. PLAS, M. PUÉCHAVY, *Trente ans de droit européen des droits de l'homme. Etudes à la mémoire de Wolfgang Strasser,* Anthemis, 2008, 189.

[69] The definitions of Wildhaber, Leach and Buyse are focused on as they are most widely reproduced.

[70] L. WILHABER, "Pilot Judgments in Cases of Structural or Systemic Problems on the National Level" in R. WOLFRUM, U. DEUTSCH, *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, International Workshop, Heidelberg, December 2007, 71.

(v) the Court decides to adjourn the consideration of all pending applications deriving from the same systemic problem;

(vi) the Court includes the general measures in the operative part of the judgment;

(vii) the Court reserves the question concerning just satisfaction based on article 41;

(viii) the Court communicates it's approach to the Committee of Ministers and the key Council of Europe bodies are informed of developments in the pilot case.

Prof. Philip Leach takes a more flexible approach and has identified three criteria that define a full pilot judgment as follows:[71]

(i) the explicit application by the ECtHR of the pilot judgment procedure;

(ii) the identification by the Court of a systemic violation of the ECHR; and

(iii) the stipulation of general measure in the operative part of the judgment in order that the respondent State should resolve the systemic issue (which may be subject to specific time-limits).

Prof. Buyse has specified only two criteria which make up the core of a pilot judgment: [72]

(i) the identification of a systemic problem and;

(ii) explicit guidance given by the Court to the State concerned.

The Court itself seems to be taking the most flexible approach, posing that the inclusion of the remedial general measures in the operative part of the judgment is the crucial element that defines a pilot judgment procedure in the strict sense.[73]

[71] P. LEACH, "Can the European Court's Pilot Judgment Procedure Help Resolve Systemic Human Rights Violations? *Burdov* and the Failure to Implement Domestic Court Decisions in Russia", *Human Rights Law Review*, 2010, p. 351; P. LEACH "Resolving Systemic Human Rights Violations – Assessing the European Court's Pilot Judgment Procedure", in S. Besson (ed.), *The European Court of Human Rights after Protocol 14 – Preliminary Assessment and Perspectives*, Schulthess, 2011, p. 224; P. LEACH, H. HARDMAN, S. STEPHENSON, B.K. BLITZ, *Responding to Systemic Human Rights Violations. An Analysis of 'Pilot Judgments' of the European Court of Human Rights and their Impact at National Level*, Intersentia, 2010, p. 22.

[72] This is mainly because he poses that the Court employs the pilot procedure rather on a continuum than as a black and white division between pilots and individual cases. This point will be revisited below in the next sub-chapter starting from page 25; A. BUYSSE, "The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges", *Nomiko Vima (Greek Law Journal): European Court of Human Rights - 50 Years*, 2010,

[73] European Court of Human Rights Press Unit, *Factsheet – Pilot Judgments*, July 2015, p.1, http://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf.

II.1 Varying definitions for the pilot judgment procedure

Criteria	Wildhaber	Leach	Buyse	The Court
Grand Chamber	X			
Identification of a systemic problem	X	X	X	
Class of individuals in a similar situation	X			
Systemic problem may give rise to numerous subsequent applications	X			
Indication of general measures	X		X	
Retroactive application of general measures	X			
Adjournment of pending similar applications	X			
General measures in the operative part of the judgment	X	X		X
Reservation of the question concerning just satisfaction	X			
Communication of approach to the Committee of Ministers and providing information to key Council of Europe bodies	X			
Explicit mention of the application of the pilot judgment procedure in the judgment		X		

Furthermore, within the Court there are a myriad of different views concerning what characteristics make up a full pilot judgment. The fact that there is discussion among judges within the Court concerning what a pilot judgment is and means was expressly mentioned during an interview.[74] Some adhere to the formal definition expressly proposed by the Court whereby the defining element is the inclusion of general measures in the operative provisions.[75] One of the interviewees further put forward that a case is a pilot when it is communicated as such to the State.[76] Most interestingly, one respondent with considerable experience provided a pragmatically detailed definition of the procedure, which differed considerably from the ones above:

> *" [The Pilot Judgment Procedure is a] procedure for prioritized handling of repetitive cases which raise structural problems, involving (1) the identification of a lead case for communication; (2) adjournment of the remaining applications of the same type; (3) in the event of a violation, a ruling under article 46, (a) an order of general measures aiming at*

[74] Interview dd 18.01.2017.
[75] Interview anonymous; Interview dd 16.01.2017; Interview dd 19.01.2017.
[76] Interview dd 09.01.2017.

redressing the applicants in the adjourned cases by means of domestic remedies or measures and/or of any potential applicants, (b) development of a follow-up friendly settlement procedure to strike out the adjourned applications; (4) enhanced supervision of the execution phase; (5) if necessary, resumption of the procedure by means of a follow-up pilot decision/judgment; (6) WECL [Well-Established Case Law]."[77]

This definition proves particularly interesting since all of the mentioned elements indeed play an important part in designing a successful pilot judgment. The pragmatic view of this particular respondent depicts a rather complete overview of how the procedure works from the inside. These elements will subsequently be discussed in the following sub-chapters.[78]

2. Quasi-pilots or article 46 cases[79]

Although these different views already make defining the pilot judgment procedure difficult, the practice proves to be even more complex. The Court has also issued judgments that come within the realm of pilot judgments, cases in which a systemic problem was identified but the adoption of measures are merely proposed in the reasoning of the Court.[80] These cases are not categorized as pilot judgments in the strict sense because they don't include the indication of the proposed general measures in the operative part of the judgment. Quasi-pilots are also identified by the fact that the Court does not expressly mention the application of the pilot judgment procedure in the judgment itself, like for instance in the case of *Lukenda v. Slovenia*.[81] Instead, in the literature they are labelled 'quasi-pilots' or 'article 46 cases'.[82] One of the respondents in Strasbourg explained that article 46 cases are close to pilot cases. They do not

[77] Interview dd 17.01.2017.
[78] They will further all be brought together in the conclusion of this dissertation, on page 193.
[79] Article 46 of the Convention is concerned with the binding force and the execution of the Court's judgments. It futher entails the division of competences between the Court, the states and the Committee of Ministers. The Court entertains a case under article 46 if it entails a problem of a large-scale nature on which it has already rendered a judgment in a previous similar case. It is used as a reminder to the state that the problem is already known and the state should have addressed it after the previous judgment based on its obligations under article 46.
[80] European Court of Human Rights, *Seminar Background Paper Implementation of the judgments of the European Court of Human Rights*, 2014, § 9.
[81] ECtHR, *Lukenda v. Slovenia*, application no. 23032/02, 6 October 2005, § 89-96. The case was however marked as a pilot case afterwards by the Court, in the Kuric judgment (ECtHR, *Kurić and others v. Slovenia*, application no. 26828/06, 26 June 2012).
[82] examples are *Lukenda v. Slovenia (*ECtHR, Lukenda v. Slovenia, Application no. 23032/02, 6 October 2005), *Xenides-Arestis v. Turkey (*ECtHR, *Xenides Arestis v. Turkey*, Application no. 46347/99, 22 December 2005), and *Klaus and Iouri Kiladze v. Georgia (*ECtHR, *Klaus and Yuri Kalidze v. Georgia*, Application no. 7975/06, 2 February 2010); see P. LEACH, "Can the European Court's Pilot Judgment Procedure Help Resolve Systemic Human Rights Violations? *Burdov* and the Failure to Implement Domestic Court Decisions in Russia", *Human Rights Law* Review, 2010, pg. 351; P. LEACH "Resolving Systemic Human Rights Violations – Assessing the European Court's Pilot Judgment Procedure", in S. BESSON (ed.) *The European Court of Human Rights after Protocol 14 – Preliminary Assessment and Perspectives*, Schulthess, 2011, p. 224; C. DUBOIS, E. PENNINCKX, *La procédure devant la Cour européenne des Droits de l'Homme et le Comité des Ministres*, Wolters Kluwer, 2016, 305 ; A. BUYSSE, "The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges", *Nomiko Vima (Greek Law Journal): European Court of Human Rights - 50 Years*, 2010, 81.

entail the use of the full procedure but by resorting to article 46, the Court is detecting a problem.[83]

Article 46 of the ECHR outlines the obligations attributed to the different bodies and actors in the Council of Europe. Under this article, States must abide by the final judgment of the European Court of Human Rights and must execute these judgments accordingly. In cases where the Court involves article 46 in its reasoning, it will investigate the broader situation surrounding the violation at hand. This means that the Court is concluding that the State involved has put up and maintained a system which is in itself in violation of a certain right of the Convention. These sorts of systems point to the existence of a systemic situation resulting in human rights violations, a situation which might lead to the decision of the Court to apply the pilot judgment procedure. In some cases however, the Court merely resorts to such an article 46 consideration, while not employing the pilot judgment procedure. As will be discussed in the next sub-part starting from page 37, the reasons for this are not always known.

Generally, the existence of full pilots and quasi-pilots results from the flexibility that was built into the procedure. One respondent stated that it would even be a mistake to think that there is one inflexible pilot judgment procedure. These structural issues are different in every case: they have varying origins – historically grown, rooted in politics or laid down in law or practice -, they affect different numbers of people and involve different monetary values. The procedure thus must come in different shapes and sizes.[84] A lawyer further explained that this flexibility is an asset to the procedure. The procedure can be adapted to the national circumstances, whether the State is already doing something about it and the expectations that the Court itself has of the solutions that need to be offered by the State.[85]

In some instances, the quasi-pilot format is used as a warning by the Court. In these situations, the underlying systemic issue has been known for quite a while and the Court is trying to motivate the involved State to finally address it. In *Novruk and others v. Russia* the Court indeed expressly warned the State that if it does not solve the issue, the Court will have to take the next opportunity to come out with a pilot judgment.[86] The quasi-pilot case of *Iacov Stanciu v. Romania* was also followed by a full pilot case *Rezmiveş and others v. Romania*.[87] During the course of the interviews, this possibility to use the procedure as a 'flag' towards the State was mentioned. Such a quasi-pilot can be used in cases where the Court doesn't find it necessary yet to employ the full-fledged pilot procedure. It is then used as a last warning to the State that they must take measures to fix the problem according to the suggestions of the Court. If they do not, then perhaps the full procedure will follow.[88]

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[83] Interview II dd 18.01.2017.
[84] Interview anonymous II.
[85] Interview I dd 16.01.2017.
[86] ECtHR, *Novruk and others v. Russia*, application nos. 31039/11, 48511/11, 76810/12, 14618/13 and 13817/14, 15 March 2016, §135.
[87] ECtHR, *Rezmiveş and others v. Romania*, application nos. 61467/12, 39516/13, 48231/13 and 68191/13, 25 April 2017.
[88] Interview dd 9.01.2017.

However, a point that consistently came up during the interviews was the strategic choice of the Court to use the full pilot procedure in cases where the cooperation of the State is relatively certain.[89] The importance of the State's willingness to cooperate will be discussed more in-depth below with respect to the arguments used by the Court to decide to apply the procedure.[90]

3. Cases involving a systemic issue without procedural consequence

Going further, the Court has also issued cases in which it referred to the existence of a systemic problem, or even identified the problem itself, but then did not indicate general measures at all. It merely stated that structural changes in the Member State would be necessary but that the State itself is best placed to decide on which measures to employ, under the supervision of the Committee of Ministers. In these kinds of cases, it thus identifies the case as potentially falling within the category of article 46 or even pilot cases, but it decides to go about it as usual in individual cases.[91] In the case of *Makharadze and Sikharulidze v. Georgia,* the Court mentioned that the inadequate treatment of prisoners suffering from serious contagious diseases formed a structural issue in the country at the material time.[92] It did however not come back to this finding of a structural issue and continued to treat the case on a merely individual basis. Interestingly, in the case of *Holomiov v. Moldova*, the Court did not find a structural issue of tacit prolongations of pre-trial detention in Moldova despite the fact that the Moldovan judge had claimed that the issue was systemic. In his separate opinion, judge Pavlovschi regretted the fact that the Court had not pointed towards the systemic nature of this problem and in the argument referred to the *Broniowski* case.[93]

4. Repercussions of the continuum: does it really matter?

However, the Court does not always adhere to its one criterion of the inclusion of the general measures in the operative part of the judgment. For instance, in the cases of *Vassilios Athanasiou v. Greece, Michelioudakis v. Greece, Finger v. Bulgaria* and *Dimitrov and Hamanov v. Bulgaria* the Court referred to previous pilot cases. In this reference to other cases it also included the case of *Scordino v. Italy,* in which it hadn't included general measures in the operative part.[94] It has even marked the case of *Dogan and others v. Turkey* as being a pilot

[89] Interview dd 9.01.2017; Interview dd 12.01.2017; Interview II dd 20.01.2017; Interview dd 17.01.2017; Interview anonymous I; Interview anonymous II; Interview I dd 18.01.2017; Interview II dd 18.01.2017; Interview dd 19.01.2017.

[90] This discussion will start from page 55. As will be discussed throughout this dissertation, it seems that the application of the pilot procedure is used strategically. As a result of this, the procedure is indeed flexible so that theoretically, it is difficult to make the distinction between the inherent characteristics of a pilot case on the one hand, and the arguments used by the Court to apply the procedure on the other. These elements will collide a bit, depending on the situation. As the strategy behind the pilot judgment procedure mostly lies in the decision to apply the procedure, the arguably decisive element of the cooperation level of the involved state will thus be discussed in the context of the selection of a pilot case.

[91] An overview of such cases is given in Annex 9 on page 233. It must be emphasized that this overview is not meant to be exhaustive.

[92] ECtHR, *Makharadze and Sikharulidze v. Georgia,* application no. 35254/07, 22 November 2011, § 54.

[93] ECtHR, *Holomiov v. Moldova*, application no. 30649/05, 7 November 2006, Partly Concurring, Partly Dissention Opinion of Judge Pavlovschi.

[94] ECtHR, *Vassilios Athanasiou et autres v. Greece*, application no. 50973/08, 20 December 2010, § 44; ECtHR, *Michelioudakis c Grèce*, application no. 54447/10, 3 April 2012, § 64; ECtHR, *Finger v. Bulgaria*, application no.

long after it had already delivered its judgment, while in this initial judgment it was not handled as a pilot.[95] The abovementioned quasi-pilot of *Lukenda v. Slovenia* was also later on labelled as a pilot in the *Kurić* case.[96] This creates the assumption that the Court itself does not make a strict distinction between pilot cases, quasi-pilots cases and other cases mentioning the existence of a systemic issue.

Therefore, in line with Buyse, it can be argued that there is in fact a continuum between cases concerned with strictly individual issues on the one extreme, and pilot cases on the other.[97] The procedure is thus used fairly flexible in practice.

Interestingly, this does not seem to be the result of sloppy practice. To the contrary, as Wildhaber recognizes, this flexibility is needed "to accommodate the range of different situations with which the Court is confronted."[98] It could thus be argued that this flexibility is a strategic choice of the Court, making it possible to adapt it to the specific circumstances of the case at hand. The lowest common denominator in all of these cases it then "*the attempt to address a problem affecting large numbers of persons through a judgment in an individual case, whether this is expressly acknowledged or not.*"[99] This onus on the flexible nature of the pilot judgment procedure is emphasized by the Court itself. In the case of *Rutkowski v. Poland,* the Court explained that the procedure can be adapted to the whole of legal and factual circumstances in a given situation, as well as its own caseload developments.[100] As explained above under "Quasi-pilots or article 46 cases" starting from page 25, this is also a conclusion that can be supported based on the empirical research adopted within the framework of this doctoral research.

The idea that flexibility was purposely designed into the procedure from the very beginning can however be nuanced. One respondent with considerable and differentiated experience on this

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37346/05, 10 May 2011, § 114; ECtHR, *Dimitrov and Hamanov v. Bulgaria*, application nos. 48059/06 and 2708/09, 10 May 2011, § 109.

[95] ECtHR, decision, I*çyer v. Turkey*, Application no. 18888/02, 12 January 2006; ECtHR, *Dogan and others v. Turkey*, application nos. 8803-8811/02,8813/02 and 8815-8819/02 , 29 June 2004; A. Buysse, "The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges", *Nomiko Vima (Greek Law Journal): European Court of Human Rights - 50 Years*, 2010, 82. The Court did the same with the case of Mandić and Jović v. Slovenia, a quasi-pilot which it marked as a pilot case in the decision closing the *Kurić* pilot proceedings in ECtHR, decision, *Anastasov and others v. Slovenia*, application no. 65020/13, 18 October 2016, § 72.

[96] *Kurić and others v. Slovenia*, application no. 26828/06, 26 June 2012, § 413.

[97] A. BUYSSE, "The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges", *Nomiko Vima (Greek Law Journal): European Court of Human Rights - 50 Years*, 2010, 84; also followed BY C. DUBOIS, E. PENNINCKX, *La procédure devant la Cour européenne des Droits de l'Homme et le Comité des Ministres*, Wolters Kluwer, 2016, 305.

[98] L. WILHABER, "Pilot Judgments in Cases of Structural or Systemic Problems on the National Level" in R. WOLFRUM, U. DEUTSCH, *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, International Workshop, Heidelberg, December 2007, 74.

[99] L. WILHABER, "Pilot Judgments in Cases of Structural or Systemic Problems on the National Level" in R. WOLFRUM, U. DEUTSCH, *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, International Workshop, Heidelberg, December 2007, 75; C. DUBOIS, E. PENNINCKX, *La procédure devant la Cour européenne des Droits de l'Homme et le Comité des Ministres*, Wolters Kluwer, 2016, 307.

[100] ECtHR, *Rutkowski and others v. Poland*, application nos. 72287/10, 13927/11 and 46187/11, 7 July 2015, §226.

topic, remarked that the distinction between pilots and quasi-pilots grew organically. In the early period between 2004 and 2008, the Court was still experimenting with the procedure:

> *"the Court was practicing but also learning how to proceed with pilot judgment procedures. That is why whenever there was a possibility of introducing article 46, without entering into a deeper dialogue but there was enough substantive material to define that there are structural problems, the Court was reaching upon semi-pilot judgment procedures which were equally successful as the pilot judgment procedure."*[101]

The respondent continued that the distinction has lost its importance since the codification of the procedure with the adoption of Rule 61. This idea is backed by another colleague who stated that the situation is clearer since the adoption of this rule, although it is still not completely clear-cut.[102]

Flexibility then plays a role in the detail used by the Court to indicate the general measures needed. In the early cases of *Broniowski* and *Hutten-Czapska*, the Court leaves the States rather free in which kinds of measures it should include. Basing itself on article 46, the Court makes some suggestions and subsequently poses that the State remains free to choose the means to remedy the systemic problem, under the supervision of the Committee of Ministers.[103] In the Broniowski template, the Court includes broadly in the operative part that the State should take general measures, and in which general direction these measures should go. In other cases, the Court is much more detailed and gives a whole list of complex general measures. For instance, in the cases of *Neshkov and others v. Bulgaria*, *Varga v. Hungary* and *Rutkowski v. Poland*, the Court goes into a lot of detail concerning the possible avenues for general measures to take. It seems as if the Court is in fact communicating with the Committee of Ministers as to its views on how the State should tackle the issue.[104] Even stronger, in the case of *Suljagic v. Bosnia and Herzegovina*, the Court included a specific list of tasks for the State to complete in order to remedy the systemic issue identified in the judgment.[105] Even in a quasi-pilot, in the case of *Oleksandr Volkov v. Ukraine*, the Court decided to list specific general measures to be taken by the State. It decided to do so since "the nature of the violation found may be such as to leave no real choice as to the measures required to remedy it and the Court may decide to indicate a specific measure."[106] In any case, from the moment the Court includes an article 46 finding in its judgment – whether that is a full pilot or a quasi-pilot – this will lead to closer scrutiny with respect to

[101] Interview dd 12.01.2017.
[102] Interview I dd 16.01.2017.
[103] Among others: ECtHR, *Broniowski v. Poland*, application no. 31443/96, 22 June 2004, §193; ECtHR, *Hutten-Czapska v. Poland*, application no. 35014/97, 19 June 2006, §239; ECtHR, *Burdov v. Russia (no. 2)*, application no. 33509/04, 15 January 2009, §140.
[104] ECtHR, *Neshkov and others v. Bulgaria*; application nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, 27 January 2015, §§274-289; ECtHR, *Varga and others v. Hungary*, application nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, 10 March 2015, §§101-110; ECtHR, *Rutkowski and others v. Poland*, application nos. 72287/10, 13927/11 and 46187/11, 7 July 2015, §§207-222.
[105] ECtHR, *Suljagic v. Bosnia and Herzegovina*, application no. 27912/02, 3 November 2009, point 4 of the operative part.
[106] ECtHR, *Oleksandr Volkov v. Ukraine*, application no. 21722/11, 9 January 2013, §195.

execution. Furthermore, the case will be communicated to the Committee of Ministers and the Council of Europe as involving a systemic issue.[107]

In conclusion, it seems that the Court itself does not always differentiate between full pilots and quasi-pilots. The practice shows a lot of flexibility with respect to one of the defining elements of the pilot judgment procedure: the indication of general measures. Other cases in which the Court finds a systemic issue without attaching a procedural consequence are however generally treated as individual cases.

5. Demarcation of the pilot in this research project.

Consequently, demarcating the concept of a pilot case is practically difficult. Different definitions have been used by varying actors. Yet others exist at the Court. These different viewpoints are shown in the practice where the labelling of a case as a pilot or a quasi-pilot has led to a variety of procedural consequences. For the purpose of this thesis, the researcher has chosen to include as broad a spectrum as possible although the onus will be on full pilots.

There will thus be mention of the division between full pilots and quasi-pilots. The Court does treat these cases differently from a procedural point of view. For instance, the qualification of a case as a pilot can – and will in a considerable part of the cases - result in the official adjourning of similar pending or incoming cases. Quasi-pilot cases do not result in the official freezing of similar cases. This is an important distinction, certainly from the perspective of the applicants.

As to the categorization of full pilot cases, the researcher has chosen to only take into account the cases in which the Court has applied the pilot judgment procedure and has mentioned that it has done so in the original judgment. The Court has been known to mark cases retroactively as pilots. [108] It is however not clear if these cases were then indeed handled as such. As a result, the researcher has chosen to take the Court for its word and only categorize cases in which the Court expressly mentions the application of the pilot judgment procedure under the heading of full pilots.

The category of quasi-pilot cases encompasses a wider range of varying procedural elements. As a consequence, this group of cases will be more difficult to catch in a single description. Generally however, for the purpose of this thesis this category includes all cases in which the Court identifies a structural problem and applies article 46 to this issue. Cases in which the

[107] Interview II dd 17.01.2017.

[108] Two cases have afterwards been termed by the Court to be pilot cases, while they were not marked as such in the original case. The case of ***Lukenda v. Slovenia*** (ECtHR, *Lukenda v. Slovenia*, application no. 23032/02, 6 October 2005) was marked as a pilot case in the *Kuric* case (ECtHR, Kurić and others v. Slovenia, application no. 26828/06, 26 June 2012, § 413). The case of ***Dogan and others v. Turkey*** (ECtHR, *Dogan and others v. Turkey*, Application nos. 8803-8811/02,8813/02 and 8815-8819/02 , 29 June 2004) has been termed a pilot case in the Içyer v. Turkey (decision), (ECtHR decision, *Içyer v. Turkey*, Application no. 18888/02, 12 January 2006; ECtHR). However, these two cases are not included in the Registry's factsheet concerning pilot judgments, nor are they marked as such in HUDOC. As a result, it is not clear whether the Court as a whole indeed regards these cases as pilots. As a result, they are not included as such in this thesis.

Court merely mentions the existence of a structural issue in the obiter dicta but does not attach any procedural consequence to this are not included in this group of quasi-pilots.

If we then try to make a genealogy of pilots and pilot-like cases:

II.2 CONTINUUM OF PILOTS AND PILOT-LIKE CASES[109]

Name of the case	issued by Grand Chamber	systemic/structural problem/practice incompatible with Convention	a class of individuals	general measures	general measures apply retroactively	freeze pending communicated cases	freezing of non-communicated cases	General measures in operative part	reservation of article 41 issue	expressly marked as PJP
Broniowski v. Poland	x	x	x	x	x	x	x	x	x	x (in the friendly settlement judgment)
Hutten-Czapska v. Poland	referral after chamber judgment	x	x	x	x	x	x	x	/	x
Burdov (no. 2) v. Russia	/	x	/	x	partially (freezing of cases coming after PJP)	/	/	x	/	x
Olaru and others v. Moldova	x	x	x	x	x	x	x	x	x	x
Yuriy Nikolaeyevich Ivanov. Ukraine	/	x	/	x	partially (freezing of cases coming after PJP)	/	/	x	/	x
Suljagic v. Bosnia and Herzegovina	/	x	/	x	x	x	x	x	/	x
Rumpf v. Germany	/	x	/	x	/	/	/	x	/	x
Maria Atanasiu and others v. Romania	x	x	/	x	x	x	x	x	/	x
Greens and M.T. v. UK	/	x	x	x	x	x	x	x	/	x
Vasilios Athanasiou and others v. Greece	/	x	/	x	/	/	/	x	/	x
Finger v. Bulgaria	/	x	/	x	x	/	/	x	/	x
Dimitrov and Hamanov v. Bulgaria	/	x	/	x	x	/	/	x	/	x
Ananyev and others v. Russia	/	x	x	x	x	/	/	x	/	x

[109] It is important to note that this chart is indeed non-exhaustive with respect to all cases encompassing a systemic issue. One respondent explained that sometimes the Court de facto used the pilot judgment procedure – or some version of it – without ever explicitly stating so. One case was chosen and once the judgment had become final, the Registry contacted the state and asked what is was planning to do about the rest of the similar pending cases. The state decided to solve the issue, so that the other pending cases could be struck out of the list of cases (Interview dd 23.02.2017). This shows that the Court renders judgments in cases where there is indeed a systemic issue going on. However, if the Court decides to go about it differently and the systemic

nature of the underlying problem is never made public, it is impossible to know. As a result, I want to stress that it is impossible to provide an exhaustive list of the complete continuum. I have however attempted to include all cases deemed relevant on the basis of public information.

Name of the case	issued by Grand Chamber	systemic/structural problem/practice incompatible with Convention	a class of individuals	general measures	general measures apply retroactively	freeze pending communicated cases	freezing of non-communicated cases	General measures in operative part	reservation of article 41 issue	expressly marked as PJP
Ümmühan Kaplan v. Turkey	/	x	/	x	depends! (see point 5 of operative part)	partially, crucial date is the adoption of a measure at Constitutional Court	x	x	/	x
Michelioudakis v. Greece	/	x	/	x	x	x	x	x	/	x
Kuric and others v. Slovenia	referral after chamber judgment	x	x	x	x	x	x	x	/	x
Manushaqe Puto and others v. Albania	/	x	/	x	x	/	/		/	x
Glykantzi v. Greece	/	x	/	x	x	x	x	x	/	x
Torregiani and others v. Italy	/	x	x	x	x	/	x	x	/	x
M.C. and others v. Italy	/	x	x	x	x	/	x	x	x	x
Gerasimov and others v. Russia	/	x	x	x	x	x	x	x	/	x
Alisic and others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia	Referral after Chamber case	x	x	x	x	x	x	x	/	x
Neshkov and others v. Bulgaria	/	x	x	x	/	/	/	x	/	x
Varga and others v. Hungary	/	x	x	x	/	/	/	x	/	x
Rutkowski and others v. Poland	/	x	/	x	x	x	/x communicated to state in order to offer redress	x	/	x
Gaszo v. Hungary	/	x	/	x	x	/	/	x	/	x
W.D. v. Belgium	/	x	x	x	x	x	x	x	/	x
Rezmiveş and others v Romania	/	x	x	x	x	/	/	x	/	x

Name of the case	issued by Grand Chamber	systemic/structural problem/practice incompatible with Convention	a class of individuals	general measures	general measures apply retroactively	freeze pending communicated cases	freezing of non-communicated cases	General measures in operative part	reservation of article 41 issue	expressly marked as PJP
Doğan and others v. Turkey	/	x	x	/	/	/	/	/	x	afterwards
Lukenda v. Slovenia	/	x	/	x	/	/	/	x	/	afterwards
Xenides-Arestis v. Turkey	/	widespread problem'	x	x	/	/	/	x	/	afterwards
Sejdovic v. Italy	referral after Chamber case	x	/	/	/	/	/	/	/	/
Scordino (no. 1) v. Italy	x	x	x	x	/	/	/	/	/	/
Kauczor v. Poland	/	x	x	/ (implictly)	/	/	/	/	/	/
Orchowski v. Poland	/	x	x	x	/	/	/	/	/	/
M.S.S. v. Belgium and Greece	/	/ (implicitly - at the Court. Looking at the documents of CoM: classified as structural and complex problem re Greece)	x	/	/	/	/	/	/	/
Mandic and Jovic v. Slovenia	/	/ (only problem in Ljubljana prison, not nation-wide)	x	/	/	/	/	/	/	/
StrucL and others v. Slovenia	/	/ (only problem in Ljubljana prison, not nation-wide)	x	/	/	/	/	/	/	/
Kaverzin v. Ukraine	/	x	x	x	/	/	/	/	/	/
Iacov Stanciu v. Romania	/	x	x	x	/	/	/	/	/	/
Aslakhanova v. Russia	/	x	x	x	/	/	/	/	/	/
Oleksandr Volkov v. Ukraine	/	x	x	x	/	/	/	/	x	/
Vlad and others v. Romania	/	x	/	x	/	/	/	x	/	/
Bittó and others v. Slovakia	/	/ (implicitly)	/	x	/	/	/	/	x	/
Grande Stevens and others v. Italy	/	/	/	/	/	/	/	/	/	/
Novruk and others v. Russia	/	x	x	/	/	/	/	/	/	/
Zherebin v. Russia	/	x	x	x	/	/	/	/	/	/

Name of the case	issued by Grand Chamber	systemic/structural problem/practice incompatible with Convention	a class of individuals	general measures	general measures apply retroactively	freeze pending communicated cases	freezing of non-communicated cases	General measures in operative part	reservation of article 41 issue	expressly marked as PJP
Makharadze and Sikharulidze v. Georgia	/	x	x	/	/	/	/	/	/	/
Konstantin Markin v. Russia	x	x	x	/	/	/	/	/	/	/
Centro Europa 7 S.R.L. and Di Stefano v. Italy	x	/ (but stressed by third party)	/	/	/	/	/	/	/	/
Tarakhel v. Switzerland	x	/ (brought up by applicants)	x	/	/	/	/	/	/	/
Söro v. Estonia	/	/ (but mentioned in separate opinion by Judge Pinto)	x	/	/	/	/	/	/	/
Mursic v. Croatia	x	/ (argued by applicant but explictly rejected by Court)	x	/	/	/	/	/	/	/
Holomiov v. Moldava	/	/ (Moldovan judge in his separate opinion stressed the structural nature of issue)	x	/	/	/	/	/	/	/
Yevdokimov and others v. Russia	/	x	x	x	/	/	/	/	/	/
Mansur Yalçin v. Turkey	/	x	x	x	/	/	/	/	/	/
S.Z. v. Bulgaria	/	x	/	/	/	/	/	/	/	/
Lindheim and others v. Norway	/	x	x	x	/	/	/	/	/	/
Grudic v. Serbia	/	x	x	x	/	/	/	/	/	/
Harakchiev and Tolumov v. Bulgaria	/	x	x	x	/	/	/	/	/	/

B. The selection of a pilot case

There is thus not one template for a pilot judgment procedure, there exists something more akin to a continuum. However, it is a continuum with rudimentary demarcations. It does matter whether a case is being labelled as a full pilot or a quasi-pilot. It will create the possibility for the Court to adjourn pending similar applications, the element which is mostly marked as paramount to the efficient nature of the procedure. It further impacts the position of applicants in the same position as the applicant in the pilot case. Therefore, the question arises which situations warrant the Court's decision to apply the full pilot judgment procedure.

This chapter will be divided into two parts, as there are intrinsically two questions that need to be answered. Firstly, in which situations does the Court decide to apply the pilot judgment procedure? When receiving a bulk of applications that share a root cause, the Court can select one or more for priority treatment under the pilot procedure.[110] Indeed, the size of the group of applicants that the Court receives seems to be an important determinant in applying the pilot judgment procedure.[111] It is however not necessary that the Court already has a certain amount of similar cases pending on its docket.[112] The possible influx of future similar cases is in itself sufficient for the Court to initiate a pilot judgment procedure.[113] It is thus not entirely clear how the Court selects the cases that it will apply the pilot judgment procedure to. It will depend on a combination of practical, political and legal factors.[114] In this context, the consideration whether the State is likely to be cooperative has been significant in this decision, although it will not be a prerequisite.[115] Secondly, if the Court has decided to introduce the pilot judgment procedure into a certain situation, how does it go about selecting the example case? This is important as the situation of the applicant in this example case will differ from that of the applicants in the other cases.

1. <u>The decision to apply the pilot procedure</u>

The Registry of the Court in an official document suggests that the reasons for applying the procedure are threefold. First, they are meant to assist the member States of the Council of

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[110] European Court of Human Rights Press Unit, *Factsheet – Pilot Judgments*, July 2015, p.1, http://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf.

[111] P. LEACH, H. HARDMAN, S. STEPHENSON, B.K. BLITZ, *Responding to Systemic Human Rights Violations. An Analysis of 'Pilot Judgments' of the European Court of Human Rights and their Impact at National Level*, Intersentia, 2010, p. 23.

[112] This can be inferred from the wording of Rule 61.1 of the Rules of Court: "The Court may initiate a pilot-judgment procedure and adopt a pilot judgment where the facts of an application reveal in the Contracting Party concerned the existence of a structural or systemic problem or other similar dysfunction which has given *rise or may give rise to similar applications*." (emphasis added).

[113] ECtHR, *Hutten-Czapska v. Poland*, Application no. 35014/97, 19 June 2006, §. 236; P. LEACH, H. HARDMAN, S. STEPHENSON, B.K. BLITZ, *Responding to Systemic Human Rights Violations. An Analysis of 'Pilot Judgments' of the European Court of Human Rights and their Impact at National Level*, Intersentia, 2010, p. 23.

[114] P. LEACH, H. HARDMAN, S. STEPHENSON, B.K. BLITZ, *Responding to Systemic Human Rights Violations. An Analysis of 'Pilot Judgments' of the European Court of Human Rights and their Impact at National Level*, Intersentia, 2010, p. 174.

[115] P. LEACH, H. HARDMAN, S. STEPHENSON, B.K. BLITZ, *Responding to Systemic Human Rights Violations. An Analysis of 'Pilot Judgments' of the European Court of Human Rights and their Impact at National Level*, Intersentia, 2010, p. 174.

Europe in addressing systemic or structural problems at the national level. In this context, it can be said that the pilot judgment procedure leans towards the constitutional function of the European Court of Human Rights, moving away from its strong emphasis on the individual right of application.[116] There is an important debate going on both in the Council of Europe, as well as in academia concerning the preferred role for the Court in the light of its overburdened docket. Should the Court keep with individual justice, meaning that individual applicants submit their claims to Strasbourg? Or should the Court instead focus its efforts on the legal issues at the basis of individual violations of human rights, thereby focussing on the bigger picture?[117] The pilot judgment procedure can be placed at the side of both viewpoints concerning the Court's role, as it addresses a large-scale issue through entertaining an individual case. The constitutional function however arguably takes preference as large groups of similarly situated victims do not get individual treatment of their case at the court. Second, the Registry explains that pilots aim for speedier procedures for the applicants. Third, they mean to improve the efficiency of the Court itself by reducing the number of recurring cases.[118]

The case law of the Court seems to confirm these multiple goals of the pilot procedure. In the *Wolkenberg* decision, the Court stated that the object for the Court is to facilitate the speediest and most effective resolution to the systemic problem at the national level. One of the factors that it takes into account in this decision is then the number of incoming cases.[119] In *Hutten-Czapska* however, the Court stated that the goal of the procedure is to assist State to fulfil their role in the Convention system: their role as primary safe keepers of human rights. This in turn would safeguard the rights of the involved victims as they would be offered more rapid redress.[120] It seems thus that the Court derives its justification to apply the pilot procedure from different viewpoints. Sometimes it emphasizes its own interests, claiming that the incoming or pending cases pose a threat to the Convention machinery. Other times, it focusses on the States, emphasizing their responsibility under the principle of subsidiarity.[121] In some cases, the Court explicitly references the rights of the applicants to speedy redress for violations incurred.

In practice however, it seems that the Judge-Rapporteur[122] will be in charge of selecting cases for pilot judgment treatment, in consultation with the Registrar assigned to his or her specific Section of the Court.[123] One of the respondents explained the process:

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[116] M. FYRNYS, "Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights", *German Law Journal*, 2001, p. 1233.

[117] S. GREER, L. WILDHABER, "Revisiting the Debate about 'constitutionalising' the European Court of Human Rights", 12 *HRLR*, 2013.

[118] European Court of Human Rights Press Unit, Factsheet – Pilot Judgments, October 2017, p.1, http://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf. This factsheet is regularly updated by the Registry.

[119] ECtHR decision, *Andrzej Wolkenberg and others v. Poland*, application no. 50003/99, 4 December 2007, § 34.

[120] ECtHR, *Hutten-Czapska v. Poland*, application no. 35014/97, 19 June 2006, § 234.

[121] This principle will be more thoroughly discussed below starting from page 47.

[122] The Judge-Rapporteur is assigned as the primary judge for one specific country. Which judges are assigned to which countries are however not made public.

[123] Interview II dd 18.01.2017.

> *"it is a decision which needs to be taken by a judicial formation and normally, it is the Chamber which takes this decision. Before addressing the Chamber, there is a dialogue and an intense study of the case by the Judge-Rapporteur who is helped by the lawyers of the Registry. This is the normal way the Court operates. You know that the name of the Judge-Rapporteur in this court is not known, which might appear a strange thing but this is the practice. The rapporteur plays a very important role. It is for a Chamber to decide but if the Rapporteur prepares his or her case well, then the Chamber follows."*[124]

Another interviewee explained that there is a difference with respect to the role of the Judge-Rapporteur between the procedure in a standard Chamber case on the one hand, and in Grand Chamber cases and Chamber cases involving a hearing on the other hand. In a standard Chamber case, the discussion will proceed on the basis of a draft judgment, prepared by the Registry and the Judge-Rapporteur, in which all relevant information and documents - such as third party interventions - have already been processed. With a Grand Chamber case and in Chamber cases where a hearing was held, all involved judges have access to all documents. After the hearing, there will be a deliberation and a preliminary vote which will form the basis for the draft judgment. This draft will then again be submitted to the Chamber or Grand Chamber for deliberations.[125] The Judge-Rapporteur thus plays an important role, certainly in the context of standard Chamber cases. How the Judge-rapporteur and the Registry lawyers come to the conclusion to apply the pilot procedure will depend on many elements, as will be explained throughout this sub-chapter.

a. What does the court mean when it talks about a structural problem?

It is clear from reading Rule 61[126] that the existence of a systemic or structural problem forms one of the constitutive factors for the Court to decide to apply the procedure.[127] The rule does however not define what the structural or systemic nature of such an issue entails. Seeing the importance of these concepts for the application of the pilot procedure, it is necessary to know what the Court means when it talks about a structural problem. Furthermore, the use of this terminology by the Court could function as a warning sign for the respondent State, but as long as the concept lacks predictability this will not be the case.[128] It is thus important for the success of the pilot judgment procedure that the concept of the systemic or structural nature of a problem is somewhat demarcated.

The Court in *Broniowski* focussed on the systemic and widespread nature of the issue at hand, which it said resulted from defective legislation and administrative practice in the domestic

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[124] Interview dd 19.01.2017.
[125] Interview dd 23.02.2017.
[126] Rule 61 provides that "[t]he Court may initiate a pilot-judgment procedure and adopt a pilot judgment where the facts of an application reveal in the Contracting Party concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications."
[127] C. DUBOIS, E. PENNINCKX, *La procédure devant la Cour européenne des Droits de l'Homme et le Comité des Ministres*, Wolters Kluwer, 2016, 310.
[128] M. SUSI, "The Definition of a 'Structural Problem' in the Case law of the European Court of Human Rights Since 2010", *German Yearbook of International Law*, 2012, 404.

system and which had affected or remained capable of affecting a large number of persons.[129] The *Hutten-Czapska* case in turn then introduced the terminology of structural problem and signified the starting point for using both terms quasi interchangeably.[130]

The problem quite regularly stems from defective legislation.[131] In the *Novruk* case, the Court stated that[132]:

> *"[a] systemic or structural problem stems or results not just from an isolated incident or a particular turn of events in individual cases but from defective legislation, when actions and omissions based thereon have given rise, or may give rise, to repetitive applications. […] The problem underlying the violation the Court has found concerns the legislation itself, and the findings extend beyond the sole interests of the applicants in the instant case."*

The absence of an effective domestic remedy for certain violations in the respondent State's legal system can also fall within this category.[133]

As stated early on in the *Broniowski* case however, systemic or structural issues can find their origin in what the Court has started to term in its case law 'a practice inconsistent with the Convention'.[134] Examples of such practices include: the erasure of persons from the register of

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[129] ECtHR, *Broniowski v. Poland*, application no. 31443/96, 22 June 2004, §189.
[130] ECtHR, *Hutten-Czapska v. Poland*, application no. 35014/97, 19 June 2006, § 233.
[131] Defective legislation was marked as (part of) the problem in the following cases: ECtHR, *Broniowski v. Poland*, application no. 31443/96, 22 June 2004; ECtHR, *Hutten-Czapska v. Poland*, application no. 35014/97, 19 June 2006; ECtHR, *Kurić and others v. Slovenia*, application no. 26828/06, 26 June 2012; ECtHR, *Greens and M.T. v. UK*, application nos. 60041/08 and 60054/08, 23 November 2010; ECtHR, *M.C. and others v. Italy*, application no. 5376/11, 3 September 2013.
[132] ECtHR, *Novruk and others v. Russia*, application nos. 31039/11, 48511/11, 76810/12, 14618/13 and 13817/14, 15 March 2016, § 131.
[133] Examples of this can be seen in the following cases: ECtHR, *Rumpf v. Germany*, application no. 46344/06, 2 September 2010; ECtHR, *Alisic and others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia*, application no. 60642/08, 16 July 2014; ECtHR, *Kurić and others v. Slovenia*, application no. 26828/06, 26 June 2012; ECtHR, *Greens and M.T. v. UK*, application nos. 60041/08 and 60054/08, 23 November 2010 ; ECtHR, *Varga and others v. Hungary*, application nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, 10 March 2015; ECtHR, *Neshkov and others v. Bulgaria*; application nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, 27 January 2015; ECtHR, *Gerasimov and others v. Russia*, application nos. 29920/05, 3553/06, 18876/10, 61186/10, 21176/11, 36112/11, 36426/11, 40841/11, 45381/11, 55929/11, 60822/11, 1 July 2014; ECtHR, *Torreggiani and others v. Italy*, application nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 et 37818/10, 8 January 2013; ECtHR, *Glykanzi v. Greece*, application no. 40150/09, 30 October 2012; ECtHR, *Ananyev and others v. Russia*, application nos. 42525/07 and 60800/08, 10 January 2012; ECtHR, *Manushaqe Puto and others v. Albania*, application nos. 604/07, 43628/07, 46684/07 and 34770/09, 31 July 2012; ECtHR, *Ümmühan Kaplan v. Turkey*, application no. 24240/07, 20 March 2012; ECtHR, *Burdov v. Russia (no. 2)*, application no. 33509/04, 15 January 2009; ECtHR, *Vassilios Athanasiou et autres v. Greece*, application no. 50973/08, 20 December 2010; ECtHR, *Dimitrov and Hamanov v. Bulgaria*, application nos. 48059/06 and 2708/09, 10 May 2011; ECtHR, *Finger v. Bulgaria*, application no. 37346/05, 10 May 2011; ECtHR, *Yuriy Nikolayevich Ivanov v. Ukraine*, application no. 40450/04, 15 October 2009; ECtHR, *Rutkowski and others v. Poland*, application nos. 72287/10, 13927/11 and 46187/11, 7 July 2015; ECtHR, *Gazsó v. Hungary*, application no. 48322/12, 16 July 2015; ECtHR, *W.D. v. Belgium*, application no. 73548/13, 6 September 2016.
[134] ECtHR, *Yuriy Nikolayevich Ivanov v. Ukraine*, application no. 40450/04, 15 October 2009, §88; ECtHR, *Rutkowski and others v. Poland*, application nos. 72287/10, 13927/11 and 46187/11, 7 July 2015, § 206; ECtHR, *Rumpf v. Germany*, application no. 46344/06, 2 September 2010; § 70; ECtHR, *Olaru and others v. Moldova*, application nos. 476/07, 22539/05, 17911/08 and 13136/07, 28 July 2009, § 56; ECtHR, *Maria Athanasiu and*

permanent residents[135], the non-enforcement of domestic proceedings[136], the excessive length of domestic proceedings[137], the internment of mentally ill convicts in ill-suited conditions[138], inhuman and degrading prison conditions[139], and the ineffective restitution of property confiscated during the communist regime[140].

This terminology of a 'practice inconsistent with the Convention' was first used by the Court in the case of *Bottazzi v. Italy* of 1999. In the case, the Court stated that the frequency with which violations are found indicate that there is an accumulation of identical breaches which reflect a continuing situation. This accumulation of breaches was then termed to be a practice inconsistent with the Convention.[141] In the quasi-pilot case of *Aslakhanova v. Russia*, the Court stated that the growing mass of similar cases supports the conclusion that there is a systemic practice incompatible with the Convention. It then goes on by defining this accordingly as "*an accumulation of identical breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system. Such breaches reflect a continuing situation that has not yet been remedied and in respect of which litigants have no domestic remedy. This accumulation of breaches constitutes a practice that is incompatible with the Convention*."[142] Contrarily, the Court did not conclude to the existence of a systemic issue in the case of *Mandic and Jovic v Slovenia* since the problem of overcrowding was not a nation-wide issue but only prevalent in one prison.[143] The Court could consequently not induce from the facts that there was an accumulation of breaches amounting to a pattern or a system.

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others v. Romania, application nos. 30767/05 and 33800/06, 12 October 2010, § 219; ECtHR, *Manushaqe Puto and others v. Albania*, application nos. 604/07, 43628/07, 46684/07 and 34770/09, 31 July 2012, §107; ECtHR, *Gerasimov and others v. Russia*, application nos. 29920/05, 3553/06, 18876/10, 61186/10, 21176/11, 36112/11, 36426/11, 40841/11, 45381/11, 55929/11, 60822/11, 1 July 2014, § 190; ECtHR, *Gazsó v. Hungary*, application no. 48322/12, 16 July 2015, § 37; ECtHR, *Finger v. Bulgaria*, application no. 37346/05, 10 May 2011, Point 4 operative part; ECtHR, *Dimitrov and Hamanov v. Bulgaria*, application nos. 48059/06 and 2708/09, 10 May 2011, Point 5 operative part; ECtHR, *Burdov v. Russia (no. 2)*, application no. 33509/04, 15 January 2009, § 135; ECtHR, *W.D. v. Belgium*, application no. 73548/13, 6 September 2016, § 164; ECtHR, *Torreggiani and others v. Italy*, application nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 et 37818/10, 8 January 2013, § 88.

[135] ECtHR, *Kurić and others v. Slovenia*, application no. 26828/06, 26 June 2012, § 346.

[136] ECtHR, *Yuriy Nikolayevich Ivanov v. Ukraine*, application no. 40450/04, 15 October 2009, §88; *Olaru and others v. Moldova*, application nos. 476/07, 22539/05, 17911/08 and 13136/07, 28 July 2009, § 56; ECtHR, *Manushaqe Puto and others v. Albania*, application nos. 604/07, 43628/07, 46684/07 and 34770/09, 31 July 2012, § 107-108; ECtHR, *Burdov v. Russia (no. 2)*, application no. 33509/04, 15 January 2009, §§ 131-135

[137] ECtHR, *Rutkowski and others v. Poland*, application nos. 72287/10, 13927/11 and 46187/11, 7 July 2015, § 20; ECtHR, *Rumpf v. Germany*, application no. 46344/06, 2 September 2010, § 70; ECtHR, *Gazsó v. Hungary*, application no. 48322/12, 16 July 2015, § 37; ECtHR, *Finger v. Bulgaria*, application no. 37346/05, 10 May 2011, § 119; ECtHR, *Dimitrov and Hamanov v. Bulgaria*, application nos. 48059/06 and 2708/09, 10 May 2011; § 114

[138] ECtHR, *W.D. v. Belgium*, application no. 73548/13, 6 September 2016, § 164.

[139] ECtHR, *Torreggiani and others v. Italy*, application nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 et 37818/10, 8 January 2013, § 88.

[140] *Maria Athanasiu and others v. Romania*, application nos. 30767/05 and 33800/06, 12 October 2010, § 219.

[141] ECtHR, *Bottazzi v. Italy*, application no. 34884/97, 28 July 1999, § 22.

[142] ECtHR, *Aslakhanova v. Russia*, applications nos. 2944/06 and 8300/07, 50184/07, 332/08, 42509/10, 18 December 2012, § 212.

[143] ECtHR, *Mandić and Jović v. Slovenia*, application nos. 5774/10 and 5985/10, 20 October 2011, § 127.

Based on this and a myriad of subsequent pilot cases,[144] it could be argued that the Court will find such a systemic problem by referring to previous case law. The fact that the Court has had to pronounce upon the same issue before could here be argued to be proof, showing that the underlying issue has been around for some time and affects more than just one person. However, the two original full pilot cases – *Broniowski* and *Hutten-Czapska* – were the first ones of their kind. The more recent case of *Kurić* is also the first of its kind.[145] In several cases even, the Court distinguishes the case at hand from these originals by saying that unlike *Broniowski and Hutten-Czapska*, where the Court identified new systemic issues, the Court has to render a judgment on an issue which has already entertained.[146] Consequently, the fact that the issue has already been dealt with by the court or has been around for quite some time will not be decisive for the court to find that the issue is widespread or structural. The Court will sometimes take previous case law into account to show the duration of the issue and the number of victims involved. This is however more a consequence of the systemic nature of the issue, than it is an essential factor.[147] The wording of the original *Broniowski* case also makes this clear, the systemic nature of the issue will automatically result in a wide-spread victim-base.

This discussion might create the idea that the existence of a systemic or structural issue is the prerogative of pilot and pilot-like cases. It is important to remember that the finding of the existence of a structural of systemic problem does not necessarily lead to the application of the pilot judgment procedure. The Court has found the existence of a systemic problem in individual cases as well, for instance in *MSS v. Belgium and Greece* where the Court only indirectly hinted towards a systemic problem in Greece. It did so more explicitly in *Kharchenko v Ukraine.*[148] Neither of these cases resulted in the application of the pilot judgment procedure. Therefore, it can be said that the existence of a systemic issue is a *conditio sine qua non* for the application of the pilot judgment procedure. Finding such an issue in a given case will however

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[144] ECtHR, *Ümmühan Kaplan v. Turkey*, application no. 24240/07, 20 March 2012, 65; ECtHR, *Glykanzi v. Greece*, application no. 40150/09, 30 October 2012, § 68; ECtHR, *Michelioudakis c Grèce*, application no. 54447/10, 3 April 2012 , § 55; ECtHR, *Vassilios Athanasiou et autres v. Greece*, application no. 50973/08, 20 December 2010, § 36; ECtHR, *W.D. v. Belgium*, application no. 73548/13, 6 September 2016, § 162; ECtHR, *Ananyev and others v. Russia*, application nos. 42525/07 and 60800/08, 10 January 2012, § 179; ECtHR, *Burdov v. Russia (no. 2)*, application no. 33509/04, 15 January 2009, § 122; ECtHR, *Dimitrov and Hamanov v. Bulgaria*, application nos. 48059/06 and 2708/09, 10 May 2011; § 110; ECtHR, *Finger v. Bulgaria*, application no. 37346/05, 10 May 2011, § 115; ECtHR, *Gazsó v. Hungary*, application no. 48322/12, 16 July 2015,, § 34; ECtHR, *Gerasimov and others v. Russia*, application nos. 29920/05, 3553/06, 18876/10, 61186/10, 21176/11, 36112/11, 36426/11, 40841/11, 45381/11, 55929/11, 60822/11, 1 July 2014n § 213; ECtHR, *Manushaqe Puto and others v. Albania*, application nos. 604/07, 43628/07, 46684/07 and 34770/09, 31 July 2012, § 108; ECtHR, *Maria Athanasiu and others v. Romania*, application nos. 30767/05 and 33800/06, 12 October 2010, § 215; ECtHR, *Neshkov and others v. Bulgaria*; application nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, 27 January 2015, § 268; ECtHR, *Rumpf v. Germany*, application no. 46344/06, 2 September 2010, § 53; ECtHR, *Rutkowski and others v. Poland*, application nos. 72287/10, 13927/11 and 46187/11, 7 July 2015, §§ 203-204; ECtHR, *Yuriy Nikolayevich Ivanov v. Ukraine*, application no. 40450/04, 15 October 2009, § 73.

[145] ECtHR, *Kurić and others v. Slovenia*, application no. 26828/06, 26 June 2012, § 414.

[146] Among others: ECtHR, *W.D. v. Belgium*, application no. 73548/13, 6 September 2016, § 161; ECtHR, *Maria Athanasiu and others v. Romania*, application nos. 30767/05 and 33800/06, 12 October 2010, § 215; ECtHR, *Rutkowski and others v. Poland*, application nos. 72287/10, 13927/11 and 46187/11, 7 July 2015, § 203.

[147] *in contrario to* M. SUSI, "The Definition of a 'Structural Problem' in the Case law of the European Court of Human Rights Since 2010", *German Yearbook of International Law*, 2012, 415.

[148] M. SUSI, "The Definition of a 'Structural Problem' in the Case law of the European Court of Human Rights Since 2010", *German Yearbook of International Law*, 2012, 399 + 401.

not automatically lead to the application of the procedure. There are therefore other reasons to be found in the case law.

b. The interests of the Court: is it merely a numbers game?

From a strict reading of Rule 61, the Court may decide to apply the procedure "*where the facts of an application reveal in the Contracting Party concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications*".[149] This clause consists of two separate constitutive concepts, a structural or systemic problem and a bulk of applications, linked together in a causal relationship. The Court does not define what it considers to be an issue of a systemic character, nor how many similar applications are needed to trigger the application of the pilot judgment procedure. It can further be questioned whether these are the only reasons the Court uses to apply the pilot judgment procedure.

The CDDH (the Steering Committee for Human Rights) has in this context connected the systemic nature of an issue to the repetitive character of a case before the Court. It clarified that repetitive applications are those that arise out of systemic or structural issues at the domestic level. The term repetitive then refers to the fact that the Court has in essence already judged upon this underlying systemic issue. However, the CDDH stresses that the group of cases stemming from systemic issues are not necessarily all repetitive applications. Like in the Broniowski case, the Court may be asked to judge on a case revealing a new fact pattern but which is in essence capable of resulting in a large group of applications.[150]

i Do the numbers matter?

Indeed, in most pilot cases, the Court does not drift too far off from the original wording of Rule 61. In these cases, it explicitly pinpoints as its reason to apply the procedure the existence of a systemic or widespread problem[151], the number of similar pending applications[152] or the

[149] Rule 61, §1 Rules of Court.

[150] *Steering Committee for Human Rights (CDDH), Report containing conclusions and possible proposals for action on ways to resolve the large numbers of applications arising from systemic issues identified by the Court*, CM(2013)93 add6, 11 July 2013, §4.

[151] ECtHR, *M.C. and others v. Italy*, application no. 5376/11, 3 September 2013, §113 ; ECtHR, *Torreggiani and others v. Italy*, application nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 et 37818/10, 8 January 2013, §87 ; ECtHR, *W.D. v. Belgium*, application no. 73548/13, 6 September 2016, §163 ; ECtHR, *Broniowski v. Poland (friendly settlement)*, application no. 31443/96, 28 September 2005, § 193 ; ECtHR, *Manushaqe Puto and others v. Albania*, application nos. 604/07, 43628/07, 46684/07 and 34770/09, 31 July 2012, §107; *Neshkov and others v. Bulgaria*; application nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, 27 January 2015, §268.

[152] ECtHR, *Ümmühan Kaplan v. Turkey*, application no. 24240/07, 20 March 2012, § 63-64; ECtHR, *M.C. and others v. Italy*, application no. 5376/11, 3 September 2013, §112; ECtHR, *Michelioudakis c Grèce*, application no. 54447/10, 3 April 2012, §71; ECtHR, *Torreggiani and others v. Italy*, application nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 et 37818/10, 8 January 2013, §89; ECtHR, *Vassilios Athanasiou et autres v. Greece*, application no. 50973/08, 20 December 2010, §51; ECtHR, *W.D. v. Belgium*, application no. 73548/13, 6 September 2016, §165; ECtHR, *Alisic and others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia*, application no. 60642/08, 16 July 2014, §144; ECtHR, *Ananyev and others v. Russia*, application nos. 42525/07 and 60800/08, 10 January 2012, §184; ECtHR, *Broniowski v. Poland*, application no. 31443/96, 22 June 2004, § 193; ECtHR, *Burdov v. Russia (no. 2)*, application no. 33509/04, 15 January 2009, §133; ECtHR, *Dimitrov and Hamanov v. Bulgaria*, application nos. 48059/06 and 2708/09, 10 May 2011, §110; ECtHR, *Finger v. Bulgaria*, application no. 37346/05, 10 May 2011, §115; ECtHR,

risk for future influx of cases[153]. In this context, it has also more implicitly referenced to the number of persons affected by the systemic issue[154] and eventually, the risk posed by potentially incoming cases to the effectiveness of the Convention system.[155]

The Court has however not defined the parameters used to conclude to the structural or systemic nature of an issue. Rule 61 states that the systemic nature of the issue is revealed by the facts of the case and potentially results in similar applications. We can thus ask whether the decision to apply the pilot judgment procedure is in itself merely a numbers game. Indeed, in its case law, the Court has concluded that there was a systemic problem because the case at hand was not an isolated incident. This was then based on numbers: cases pending at the national and the international level, statistics, shortcomings in the authorities' conduct affecting a large number of people, and the numerous previous judgments concerning the issue including the resulting decisions by the Committee of Ministers.[156]

Former Judge and Registrar at the time of the Broniowski case Mahoney has revealed that for him it is a numbers game. He mostly makes the distinction between a leading case and a pilot

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Gazsó v. Hungary, 16 July 2015, application no. 48322/12, §36; ECtHR, *Gerasimov and others v. Russia*, application nos. 29920/05, 3553/06, 18876/10, 61186/10, 21176/11, 36112/11, 36426/11, 40841/11, 45381/11, 55929/11, 60822/11, 1 July 2014, §213; ECtHR, *Greens and M.T. v. UK*, application nos. 60041/08 and 60054/08, 23 November 2010, §111; ECtHR, *Hutten-Czapska v. Poland*, application no. 35014/97, 19 June 2006, §236; ECtHR, *Manushaqe Puto and others v. Albania*, application nos. 604/07, 43628/07, 46684/07 and 34770/09, 31 July 2012, §108; ECtHR, *Maria Athanasiu and others v. Romania*, application nos. 30767/05 and 33800/06, 12 October 2010, §217; ECtHR, *Neshkov and others v. Bulgaria*; application nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, 27 January 2015, §270; ECtHR, *Olaru and others v. Moldova*, application nos. 476/07, 22539/05, 17911/08 and 13136/07, 28 July 2009, §53; ECtHR, *Rumpf v. Germany*, application no. 46344/06, 2 September 2010, §69; ECtHR, *Rutkowski and others v. Poland*, application nos. 72287/10, 13927/11 and 46187/11, 7 July 2015, §204; ECtHR, *Suljagic v. Bosnia and Herzegovina*, application no. 27912/02, 3 November 2009, §63; ECtHR, *Varga and others v. Hungary*, application nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, 10 March 2015, §98; ECtHR, *Yuriy Nikolayevich Ivanov v. Ukraine*, application no. 40450/04, 15 October 2009, §86.

[153] ECtHR, *Broniowski v. Poland* (friendly settlement), application no. 31443/96, 28 September 2005, § 35; ECtHR, *Kurić and others v. Slovenia*, application no. 26828/06, 26 June 2012, § 414.

[154] ECtHR, *Glykanzi v. Greece*, application no. 40150/09, 30 October 2012, § 67; ECtHR, *M.C. and others v. Italy*, application no. 5376/11, 3 September 2013, § 114 ; ECtHR, *Michelioudakis c Grèce*, application no. 54447/10, 3 April 2012, § 64; ECtHR, *Vassilios Athanasiou et autres v. Greece*, application no. 50973/08, 20 December 2010, § 44; ECtHR, *W.D. v. Belgium*, application no. 73548/13, 6 September 2016, § 164; ECtHR, *Dimitrov and Hamanov v. Bulgaria*, application nos. 48059/06 and 2708/09, 10 May 2011, § 109; ECtHR, *Gazsó v. Hungary*, application no. 48322/12, 16 July 2015, §31; ECtHR, *Kurić and others v. Slovenia*, application no. 26828/06, 26 June 2012, §413.

[155] ECtHR, *Broniowski v. Poland*, application no. 31443/96, 22 June 2004, § 193; ECtHR, *Greens and M.T. v. UK*, application nos. 60041/08 and 60054/08, 23 November 2010, § 193; ECtHR, *Manushaqe Puto and others v. Albania*, application nos. 604/07, 43628/07, 46684/07 and 34770/09, 31 July 2012, § 108; ECtHR, *Maria Athanasiu and others v. Romania*, application nos. 30767/05 and 33800/06, 12 October 2010, § 217; ECtHR, *Suljagic v. Bosnia and Herzegovina*, application no. 27912/02, 3 November 2009, § 63.

[156] ECtHR, *M.C. and others v. Italy*, application no. 5376/11, 3 September 2013, §113; ECtHR, *Torreggiani and others v. Italy*, application nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 et 37818/10, 8 January 2013, § 88 ; ECtHR, *W.D. v. Belgium*, application no. 73548/13, 6 September 2016, § 164-165 ; ECtHR, *Broniowski v. Poland* (friendly settlement), application no. 31443/96, 28 September 2005, § 35; ECtHR, *Manushaqe Puto and others v. Albania*, application nos. 604/07, 43628/07, 46684/07 and 34770/09, 31 July 2012, §107; ECtHR, *Neshkov and others v. Bulgaria*; application nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, 27 January 2015, § 268.

case, based on the number of similar pending or prospected cases. Specifically, he has written the following:

> *"The Broniowski Judgment makes it clear that this kind of approach is suitable when there is a risk of an avalanche of similar cases being lodged with the Strasbourg Court. If the position is simply that there is a general problem in the country concerned, then what is needed is what is sometimes called a "judgment of principle", which may have consequences elsewhere. But, although the judgment may well settle the issue for many other persons in a similar situation in the country concerned (hence a "judgment of principle"), it will not necessarily have the characteristics of a "pilot judgment" in the Broniowski sense. A pilot judgment in this sense is called for when there are already a number of applications pending or there is a risk of a flood of similar applications being lodged. The object, as Luzius Wildhaber said, is to prevent that flood".*[157]

ii Which numbers are required?

It does thus seem that the numbers do matter. However, the Court does not specify a minimum range with respect to the persons affected in the involved State or the number of pending applications. As to the number of pending cases, the Court is mostly relatively specific. There are situations in which over a thousand[158] or several hundred[159] *prima facie* meritorious cases are pending. Sometimes however, the number of pending cases does not seem to be extremely overwhelming. In *Hutten-Czapska* for instance, the Court had as low as eighteen similar cases pending. It mentioned then that only one of these cases involved some 200 landlords.[160] Indeed, in these situations, the Court will emphasize the potential inflow of future cases as its main reason to apply the pilot judgment procedure. There, it will then turn to the number of persons potentially affected by the systemic issue.[161] With respect to this element, the Court does not

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[157] P. MAHONEY, "Discussion Following the Presentation by Luzius Wildhaber" in R. WOLFRUM, U. DEUTSCH, *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, International Workshop, Heidelberg, December 2007, 87.

[158] ECtHR, *Ümmühan Kaplan v. Turkey*, application no. 24240/07, 20 March 2012, §64; ECtHR, *Alisic and others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia*, application no. 60642/08, 16 July 2014, §144; ECtHR, *Greens and M.T. v. UK*, application nos. 60041/08 and 60054/08, 23 November 2010 , §111; ECtHR, *Suljagic v. Bosnia and Herzegovina*, application no. 27912/02, 3 November 2009, §63; ECtHR, *Yuriy Nikolayevich Ivanov v. Ukraine*, application no. 40450/04, 15 October 2009, § 86.

[159] ECtHR, *Broniowski v. Poland*, application no. 31443/96, 22 June 2004, §193; ECtHR, *Michelioudakis c Grèce*, application no. 54447/10, 3 April 2012 , §71 ; ECtHR, *Vassilios Athanasiou et autres v. Greece*, application no. 50973/08, 20 December 2010, §51; ECtHR, *Ananyev and others v. Russia*, application nos. 42525/07 and 60800/08, 10 January 2012, §84; ECtHR, *Burdov v. Russia (no. 2)*, application no. 33509/04, 15 January 2009, §133; ECtHR, *Dimitrov and Hamanov v. Bulgaria*, application nos. 48059/06 and 2708/09, 10 May 2011, §110; ECtHR, *Finger v. Bulgaria*, application no. 37346/05, 10 May 2011, §115; ECtHR, *Gazsó v. Hungary*, application no. 48322/12, 16 July 2015, §36; ECtHR, *Gerasimov and others v. Russia*, application nos. 29920/05, 3553/06, 18876/10, 61186/10, 21176/11, 36112/11, 36426/11, 40841/11, 45381/11, 55929/11, 60822/11, 1 July 2014, §213; ECtHR, *Olaru and others v. Moldova*, application nos. 476/07, 22539/05, 17911/08 and 13136/07, 28 July 2009, §53; ECtHR, *Rutkowski and others v. Poland*, application nos. 72287/10, 13927/11 and 46187/11, 7 July 2015, §204; ECtHR, *Varga and others v. Hungary*, application nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, 10 March 2015, § 98.

[160] ECtHR, *Hutten-Czapska v. Poland*, application no. 35014/97, 19 June 2006, § 236.

[161] ECtHR, *W.D. v. Belgium*, application no. 73548/13, 6 September 2016, § 165; ECtHR, *Hutten-Czapska v. Poland*, application no. 35014/97, 19 June 2006, § 236; ECtHR, *Neshkov and others v. Bulgaria*; application nos.

always indicate how many potentially affected persons need to be involved to trigger the pilot procedure. However, the approximate numbers range from 600.000 in *Hutten-Czapska,* over 70.000 in *Greens and M.T.,* to 13.000 in *Kuric*.[162] Seeing this kind of reasoning, it could be concluded that a large number of affected persons plays an important role in the Court's decision to apply the pilot judgment procedure.

From the interviews in Strasbourg, the number of cases in the bulk is one of the decisive factors in the decision to apply the pilot procedure. There are indeed no quantitative criteria with respect to how many cases should be pending before the Court or how many previous cases have already been decided.[163] Some respondents however brought up that the number of cases is mostly important from a case-management logic.[164] It thus seems that looking at the numbers is motivated by efficiency. The respondents also indicated that the numbers were not the only factor taken into account. It is mostly a combination of different elements.[165]

iii A combination of varying reasons

Reading its case law thoroughly, the Court has indeed given a multitude of other reasons for its decision to apply the pilot judgment procedure. As already discussed, contrary to the literal text of Rule 61, it is incorrect to assume that the pilot judgment procedure will be applied solely in situations where the Court is confronted with a widespread problem for the first time. To the contrary, in almost all cases, the Court has decided to apply the pilot judgment procedure after it had already rendered judgments in similar cases.[166] This feature deviates from the original template of the pilot judgment procedure, as represented by the early cases of *Broniowski* and *Hutten-Czapska*. Indeed, the Court in some of these cases even clearly states "*unlike Broniowski and Hutten-Czapska, […] , in which the failings in the domestic legal order were identified for*

36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, 27 January 2015, §270; ECtHR, *Kurić and others v. Slovenia*, application no. 26828/06, 26 June 2012, §414.

[162] ECtHR, *Hutten-Czapska v. Poland*, application no. 35014/97, 19 June 2006, §236; ECtHR, *Greens and M.T. v. UK*, application nos. 60041/08 and 60054/08, 23 November 2010 , §111; ECtHR, *Kurić and others v. Slovenia*, application no. 26828/06, 26 June 2012, §69.

[163] Interview II dd 17.01.2017; Interview I dd 13.01.2017; Interview II dd 13.01.2017; Interview anonymous I; Interview II dd 18.01.2017; Interview II dd 16.01.2017.

[164] Interview II dd 16.01.2017; Interview II dd 17.01.2017.

[165] Interview II dd 17.01.2017; Interview II dd 13.01.2017; Interview anonymous I.

[166] ECtHR, *Ümmühan Kaplan v. Turkey*, application no. 24240/07, 20 March 2012, §65; ECtHR, Glykanzi v. Greece, application no. 40150/09, 30 October 2012, § 71; ECtHR, *Michelioudakis c Grèce*, application no. 54447/10, 3 April 2012, §68; ECtHR, *Vassilios Athanasiou et autres v. Greece*, application no. 50973/08, 20 December 2010, § 48; ECtHR, *W.D. v. Belgium*, application no. 73548/13, 6 September 2016, § 161; ECtHR, *Ananyev and others v. Russia*, application nos. 42525/07 and 60800/08, 10 January 2012, §184; ECtHR, *Burdov v. Russia (no. 2)*, application no. 33509/04, 15 January 2009, § 133; ECtHR, *Dimitrov and Hamanov v. Bulgaria*, application nos. 48059/06 and 2708/09, 10 May 2011, § 110; ECtHR, *Finger v. Bulgaria*, application no. 37346/05, 10 May 2011, § 155; ECtHR, *Gazsó v. Hungary*, 16 July 2015, application no. 48322/12, § 34; ECtHR, *Gerasimov and others v. Russia*, application nos. 29920/05, 3553/06, 18876/10, 61186/10, 21176/11, 36112/11, 36426/11, 40841/11, 45381/11, 55929/11, 60822/11, 1 July 2014, §213; ECtHR, *Manushaqe Puto and others v. Albania*, application nos. 604/07, 43628/07, 46684/07 and 34770/09, 31 July 2012, § 108; ECtHR, *Maria Athanasiu and others v. Romania*, application nos. 30767/05 and 33800/06, 12 October 2010, § 215; ECtHR, *Neshkov and others v. Bulgaria*; application nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, 27 January 2015, § 268; ECtHR, *Rumpf v. Germany*, application no. 46344/06, 2 September 2010, § 64; ECtHR, *Rutkowski and others v. Poland*, application nos. 72287/10, 13927/11 and 46187/11, 7 July 2015, § 203-204; ECtHR, *Varga and others v. Hungary*, application nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, 10 March 2015, § 98; ECtHR, *Yuriy Nikolayevich Ivanov v. Ukraine*, application no. 40450/04, 15 October 2009, § 83.

the first time, the present case comes to be considered after several judgments in which the Court has already found a violation".[167] The fact that an issue has existed for a long time already while not enough action has been taken will thus also play a role.[168] In fact, the Court has also more explicitly mentioned the substantial duration of the widespread problem, or its recurrent and persistent nature as one of the reasons to apply the procedure.[169] Even more forcefully, the Court has cited the fact that the State has not solved a known problem despite substantial and consistent case law in the matter.[170]

The Court mostly derives its justification from a combination of the abovementioned factors. One respondent in this sense explained that the number of cases is not the most important factor, it is only imperative for case management purposes. The main issue is that there was 1) a structural problem that 2) had persisted for many years that had 3) led already to a number of judgments but which did not necessarily highlight the source of these problems and 4) where the government was unresponsive to solve this issue.[171]

In none of the full pilot cases, there is only one reason to apply the pilot judgment procedure. However, with the evolution of the procedure, it seems that the Court has developed a 'standard clause', which appears almost word-for-word in different pilots. The Court has used this following standard clause in *Burdov, Finger, Michelioudakis, Vassilios Athanasiou, Dimitrov and Hamanav, Gazsó, Gerasimov, Neshkov,* and *Varga*:

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[167] ECtHR, *Maria Athanasiu and others v. Romania*, application nos. 30767/05 and 33800/06, 12 October 2010, § 215. A similar idea is also found in ECtHR, *Rutkowski and others v. Poland*, application nos. 72287/10, 13927/11 and 46187/11, 7 July 2015, § 203;

[168] This element was also brought up in Interview dd 23.02.2017; Interview II dd 16.01.2017.

[169] ECtHR, *Ümmühan Kaplan v. Turkey*, application no. 24240/07, 20 March 2012, § 63; ECtHR, *Gerasimov and others v. Russia*, application nos. 29920/05, 3553/06, 18876/10, 61186/10, 21176/11, 36112/11, 36426/11, 40841/11, 45381/11, 55929/11, 60822/11, 1 July 2014, § 213; ECtHR, *Greens and M.T. v. UK*, application nos. 60041/08 and 60054/08, 23 November 2010, §112; ECtHR, *Neshkov and others v. Bulgaria*; application nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, 27 January 2015, §271; ECtHR, *Michelioudakis c Grèce*, application no. 54447/10, 3 April 2012, § 64 ; ECtHR, *Vassilios Athanasiou et autres v. Greece*, application no. 50973/08, 20 December 2010, § 44; ECtHR, *Dimitrov and Hamanov v. Bulgaria*, application nos. 48059/06 and 2708/09, 10 May 2011, § 109; ECtHR, *Finger v. Bulgaria*, application no. 37346/05, 10 May 2011, § 114; ECtHR, *Gazsó v. Hungary*, application no. 48322/12, 16 July 2015, § 31; ECtHR, *Gerasimov and others v. Russia*, application nos. 29920/05, 3553/06, 18876/10, 61186/10, 21176/11, 36112/11, 36426/11, 40841/11, 45381/11, 55929/11, 60822/11, 1 July 2014, § 218; ECtHR, *Manushaqe Puto and others v. Albania*, application nos. 604/07, 43628/07, 46684/07 and 34770/09, 31 July 2012, § 109; ECtHR, *Maria Athanasiu and others v. Romania*, application nos. 30767/05 and 33800/06, 12 October 2010, § 216; ECtHR, *Neshkov and others v. Bulgaria*; application nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, 27 January 2015, § 271; ECtHR, *Olaru and others v. Moldova*, application nos. 476/07, 22539/05, 17911/08 and 13136/07, 28 July 2009, § 56; ECtHR, *Rumpf v. Germany*, application no. 46344/06, 2 September 2010, § 53; ECtHR, *Varga and others v. Hungary*, application nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, 10 March 2015, § 100; ECtHR, *Yuriy Nikolayevich Ivanov v. Ukraine*, application no. 40450/04, 15 October 2009, § 73.

[170] ECtHR, *W.D. v. Belgium*, application no. 73548/13, 6 September 2016, § 161; ECtHR, *Gazsó v. Hungary*, 16 July 2015, application no. 48322/12, § 35; ECtHR, *Greens and M.T. v. UK*, application nos. 60041/08 and 60054/08, 23 November 2010, § 112; ECtHR, *Maria Athanasiu and others v. Romania*, application nos. 30767/05 and 33800/06, 12 October 2010, § 216; ECtHR, *Rumpf v. Germany*, application no. 46344/06, 2 September 2010, § 68; ECtHR, *Yuriy Nikolayevich Ivanov v. Ukraine*, application no. 40450/04, 15 October 2009 , § 74.

[171] Interview II dd 16.01.2017; the level of cooperation of the State will be discussed below in "The intersection of efficiency and accessibility: was the problem solved in reality?" starting from page 182.

"*Taking into account the recurrent and persistent nature of the problem, the large number of people it has affected or is capable of affecting, and the urgent need to grant them speedy and appropriate redress at the domestic level, the Court considers it appropriate to apply the pilot-judgment procedure in the present case."*[172]

This use of a standard practice in its case law makes it clear that for the Court, the numbers are not the sole decisive criterion to decide to the existence of a systemic issue warranting the application of the pilot judgment procedure. It can be argued that there are three additional overarching goals behind the Court's decision in this respect: the principle of subsidiarity, the Court's regard for the interests of the applicants in these cases and the level of cooperation exhibited by the involved State.

c. Do the interests of the States matter? The principle of subsidiarity

The first one of these overarching goals is the emphasis that the Court places on the principle of subsidiarity that underpins the Convention.[173] The principle of subsidiarity signifies that the primary responsibility for ensuring respect for human rights rests with the States. The Court only has the competence to interfere if they fail to do so.[174] Former President of the Court, Jean-Paul Costa, has explained that under the subsidiarity principle "*States must comply with the Court's case law and make sure that judgments of the Court are adequately executed, notably by adopting the appropriate general measures and by taking remedial action in respect of cases which could give rise to similar issues*".[175] The principle thus assumes that human rights are respected by national authorities and if not, that there are domestic remedies in place. The fact that there are such high numbers of repetitive cases indicates that the principle of subsidiarity is not working properly.[176]

The principle of subsidiarity follows from the division of competences between the Committee of Ministers, the Court and the States Parties. States are attributed the primary responsibility to respect, protect and fulfil human rights as enshrined in the Convention. The Court must interpret the Convention and monitor the States' compliance with their obligations. The Committee of

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[172] ECtHR, *Burdov v. Russia (no. 2)*, application no. 33509/04, 15 January 2009, §130; ECtHR, *Finger v. Bulgaria*, application no. 37346/05, 10 May 2011, §114; ECtHR, *Michelioudakis c Grèce*, application no. 54447/10, 3 April 2012, §64; ECtHR, *Vassilios Athanasiou et autres v. Greece*, application no. 50973/08, 20 December 2010, §44; ECtHR, *Dimitrov and Hamanov v. Bulgaria*, application nos. 48059/06 and 2708/09, 10 May 2011, §109; ECtHR, *Gazsó v. Hungary*, application no. 48322/12, 16 July 2015, §31; ECtHR, *Gerasimov and others v. Russia*, application nos. 29920/05, 3553/06, 18876/10, 61186/10, 21176/11, 36112/11, 36426/11, 40841/11, 45381/11, 55929/11, 60822/11, 1 July 2014, §218; ECtHR, *Neshkov and others v. Bulgaria*; application nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, 27 January 2015, §271; ECtHR, *Varga and others v. Hungary*, application nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, 10 March 2015, §100.

[173] The principle of subsidiarity will also be looked at in a wider discussion concerning the relationship between the Court and the states in a following sub-chapter starting from page 82.

[174] H. KELLER, A. FISCHER, D. KÜHNE, "Debating the Future of the European Court of Human Rights after the Interlaken Confeence: Two Innovative Proposals", *The European Journal of International Law*, 2011, 1031.

[175] J.P. COSTA, *Memorandum of the President of the European Court of Human Rights to the States with a view to Preparing the Interlaken Conference*, 3 July 2009.

[176] H. KELLER, A. FISCHER, D. KÜHNE, "Debating the Future of the European Court of Human Rights after the Interlaken Confeence: Two Innovative Proposals", *The European Journal of International Law*, 2011, 1031.

Ministers then oversees the execution of judgments of the Court by the States.[177] Since the principle is not explicitly written into the Convention, its scope has become clear through the Court's jurisprudence. The Court has thus interpreted the principle in the context of pilot judgments.

In the case of *Gerasimov and Others v. Russia*, the Court mentioned that it would not be the best way to achieve the Convention's purpose to repeatedly find several violations in similar individual cases. It found that the pilot judgment procedure appears to be the most effective way to assist States to find appropriate solutions on the one hand, and the Committee of Ministers with supervising the execution of these solutions on the other hand.[178] It further justified its application of the pilot judgment procedure as follows: "*the Court does not have the capacity, nor is it appropriate to its function as an international court, to adjudicate on large numbers of cases which require the finding of basic facts or the calculation of monetary compensation – both of which should, as a matter of principle and effective practice, be the domain of domestic jurisdictions […]*".[179] Also in other cases, it has emphasized the Court's role in assisting States to find a solution to the underlying systemic problem from which the case at hand originated.[180] Interestingly, in the friendly settlement judgment of the Broniowski case, the Court even Stated that "*the pilot judgment procedure is primarily designed to assist the Contracting States in fulfilling their role in the Convention system by resolving such problems at national level* […]".[181]

This kind of reasoning, taken together with the other justifications offered by the Court, may indicate that it is indeed not only thinking about efficiency when applying the pilot judgment procedure. The abovementioned rationales signal that the Court is also very much concerned with reasons referring to the principle of subsidiarity underpinning the Convention. From this focus and the text of the Convention, the Convention's purpose referred to in the case of *Gerasimov and Others v. Russia* seems to be the maintenance and further realization of human rights by the State, assisted through monitoring by the Court and the Committee of Ministers.[182] This is completely in line with the principle of subsidiarity.

This conclusion is also supported by the empirical research carried out in the framework of this thesis. Several respondents at the Court have emphasized the role of the State in the context of article 46 of the Convention and have placed the pilot judgment procedure in the center of

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[177] Article 46 ECHR. The principle of subsidiarity in the context of the balance of competences within the Council of Europe will be discussed more in depth below on page 82.
[178] ECtHR, *Gerasimov and others v. Russia*, application nos. 29920/05, 3553/06, 18876/10, 61186/10, 21176/11, 36112/11, 36426/11, 40841/11, 45381/11, 55929/11, 60822/11, 1 July 2014, § 218.
[179] ECtHR, *Gerasimov and others v. Russia*, application nos. 29920/05, 3553/06, 18876/10, 61186/10, 21176/11, 36112/11, 36426/11, 40841/11, 45381/11, 55929/11, 60822/11, 1 July 2014, § 207; emphasis added.
[180] ECtHR, *Ananyev and others v. Russia*, application nos. 42525/07 and 60800/08, 10 January 2012, §190; ECtHR, *Broniowski v. Poland*, application no. 31443/96, 22 June 2004, § 194; ECtHR, *Greens and M.T. v. UK*, application nos. 60041/08 and 60054/08, 23 November 2010, § 112.
[181] ECtHR, *Broniowski v. Poland* (friendly settlement), application no. 31443/96, 28 September 2005, § 35; emphasis added.
[182] Combined reading of articles 1 and 46, and the Preamble, §3 of the Convention with ECtHR, *Gerasimov and others v. Russia*, application nos. 29920/05, 3553/06, 18876/10, 61186/10, 21176/11, 36112/11, 36426/11, 40841/11, 45381/11, 55929/11, 60822/11, 1 July 2014, § 207 + § 218.

subsidiarity. The abovementioned 'reasoning of self-preservation' employed in the *Broniowski* case fits within this viewpoint.[183]

There are different elements of the pilot judgment procedure which point towards the importance of subsidiarity. Firstly, the subsidiarity principle means that applicants should have access to remedies at home, meaning in their domestic legal system. This idea is translated in the pilot judgment procedure with the freezing of similar applications and sending them back to be dealt with domestically after the set-up of an available remedy as part of the general measures.[184] Certainly with respect to property cases involving determinations concerning a suitable amount for just satisfaction, some respondents have posed that national courts are better placed than an international court such as the European Court of Human Rights.[185]

Secondly, one respondent linked subsidiarity to judicial efficiency by referring to the pilot case of *Varga v. Hungary*[186].

> *"So this is the dilemma now, because the more you do, the more you receive cases from applicants. Because everybody turns to the court for relief. Whereas the Court's role is subsidiary and it is the primary responsibility of the contracting States to provide a resolution to a national malfunction identified by the Court."*[187]

Thirdly, the pilot judgment procedure fits within a broader legal-philosophical discussion concerning the Council of Europe mechanism. As already explained above starting from page 37, there is a discussion going on concerning the role of the Court: is it intended primarily for individual justice – risking that it turns into a small claims court - or does it have to focus on setting human rights standards alone – meaning that it takes on a constitutional role?[188] The procedure ensures through the use of the principle of subsidiarity that the Court goes back to its original role under article 19 of the Convention. This article spells out that the Court was set up "[t]o ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto (…)"[189] One respondent explained that the pilot judgment procedure shifts responsibility back to the State for providing general remedial

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[183] Interview I dd 17.01.2017.
[184] Interview dd 11.01.2017; Interview II dd 18.01.2017
[185] Interview II dd 18.01.2017; Interview III dd 13.01.2017.
[186] In this case, similar pending applications were initially not adjourned. Seeing the success of the case, this had attracted more applicants which made the case actually less efficient in the long term for the Court. The case will be discussed more in-depth below in the context of efficiency in "The shadow side of efficiency: attraction of new cases due to the pilot procedure" starting from page 130.
[187] Interview III dd 13.01.2017.
[188] In favour of a more constitutional role for the Court are Steven Greer and former Judge at the ECtHR Luzius Wildhaber, joined by Rick Lawson. Former ECtHR Judge Françoise Tulkens represents the other side of the debate, she emphasizes the importance of individual justice here. See: S. GREER, L. WILDHABER, "Revisiting the Debate about 'constitutionalising' the European Court of Human Rights", 12 *HRLR*, 2013; R. LAWSON, "De mythe van het moeten. The Europees Hof voor de Rechten van de Mens en 800 miljoen klagers", 28 *NJCM*, 2003; N. VAN LEUVEN, "'Het E.H.R.M. mag niet beschouwd worden als een fabriek, die men draaiende moet houden' Interview met Françoise Tulkens, rechter in het Europees Hof van de Rechten van de Mens in Straatsburg", Interview with Françoise Tulkens in 1 *TvMR*, 2003; H. DURIEUX, A. JOYE, "Het laatste duwtje. TvMR sprak met Françoise Tulkens, vicevoorzitter van het EHRM", Interview with Françoise Tulkens in 9 *TvMR*, 2011.
[189] Article 19 ECHR.

measures. The Court must ensure observance of human rights but that does not mean that repetitive findings of the same violation would help. For this person, it is all about subsidiarity:

> *"the purpose is to ensure that the States secure rights in accordance with the convention, secondly that the court is able to perform its functions under article 19 which means simply not having delays and being able to handle meritorious cases, warranting examination which are put aside if you are inundated by masses of similar cases."*[190]

Another respondent contrasted the principle of subsidiarity with the applicants' rights in the context of the combined reading of articles 19 and 41[191] of the Convention:

> *"On the one hand, the pilot-judgment procedure keeps the Court to its proper role, which is not to substitute itself for the national authorities in taking over the task of dealing with the nitty gritty of many identical cases, perhaps thousands and thousands. The Strasbourg Court was not set up with the intention of its converting itself into a small-claims court in the place of the national courts. I would agree that, at first blush, there is some virtue in the argument that all victims of the same violation should receive equal treatment. "Why," it is asked, "should the first applicant receive better treatment from the Strasbourg Court than the other, following victims of the same violation?" If one looks closer, however, the virtue of the argument about equality of treatment of applicants is more apparent than real. What is worse, it is capable of undermining the effectiveness of the whole Convention system. The whole point of the mission of the Court is to ensure that the Contracting States keep to their undertakings. It is not to give as much financial compensation to as many victims as possible. That is not the mission of the Court. That is how I read Article 19 (why the Court was established) and Article 41 (the Court's power to award just satisfaction).*[192]

During the interviews, some respondents have uttered the idea that having a pilot judgment procedure could be in the involved State's interests, independently of the subsidiary principle. One respondent mentioned that:

> *"There is also a tendency from a few States who have a preference to have a pilot judgment in order to gain time. (…)later experiences showed that the States want to have a pilot judgment in order to have two three four more years at their disposal."*[193]

It is not only time which is an argument in favour of the pilot judgment procedure from the viewpoint of States. Another respondent explained that one specific State might strategically have opted for a pilot case in order to have less violations to its name. [194]

[190] Interview I dd 16.01.2017.
[191] Article 41 of the Convention provides the basis for applicants to request just satisfaction from the state.
[192] Interview anonymous II.
[193] Interview I dd 18.01.2017.
[194] Interview II dd 18.01.2017.

d. Do the interests of the applicants matter?

In addition, the Court in its reasoning to apply the procedure seems to take into account the rights of the victims of these systemic human rights violations. It does so based on a number of different factors.

i The interests of all victims involved

The Court does not only focus on the applicants in the chosen pilot cases, but sometimes also refers to the interests of the larger pool of victims. Indeed, in almost all full pilot cases, the Court has justified its procedural choice partly on the basis of the urgent need to offer redress to all the persons involved.[195] One respondent has labelled the aim of compensating the victims and seeing the government taking measures in this respect as the main objective of the procedure.[196] The Court further has even gone so far as to label the pilot judgment procedure as the most speedy and effective resolution of a structural dysfunction affecting a fundamental right in the national legal order.[197] Furthermore, the Court has also referred to the gravity of the issue, which in that particular case amounted to a *de facto* denial of justice, as a reason for the application of the pilot judgment procedure.[198] The fact that the applicants in the national legal order had been denied compensation for a considerable amount of time also convinced the court in one case.[199]

ii The right to compensation

The interests of the applicants of the pilot case itself are most evidently served with respect to the finding of the violation itself and with the granting of compensation as a result. However, as shown above, the full pilot procedure as described by Luzius Wildhaber generally reserves the question of just satisfaction under article 41 for determination at a later date.[200] In some pilot cases however, the Court has decided to not reserve this determination and go ahead with the analysis of the applicants' just satisfaction claim under article 41. In the case of *Manushaque*

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[195] ECtHR, *Broniowski v. Poland* (friendly settlement), application no. 31443/96, 28 September 2005, § 35; ECtHR, *Glykanzi v. Greece*, application no. 40150/09, 30 October 2012, § 67; ECtHR, *M.C. and others v. Italy*, application no. 5376/11, 3 September 2013, § 115 ; ECtHR, *Michelioudakis c Grèce*, application no. 54447/10, 3 April 2012, § 64; ECtHR, *Torreggiani and others v. Italy*, application nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 et 37818/10, 8 January 2013, § 90; ECtHR, *Vassilios Athanasiou et autres v. Greece*, application no. 50973/08, 20 December 2010, § 44 ; ECtHR, *Ananyev and others v. Russia*, application nos. 42525/07 and 60800/08, 10 January 2012, § 190; ECtHR, *Burdov v. Russia (no. 2)*, application no. 33509/04, 15 January 2009, § 130; ECtHR, *Finger v. Bulgaria*, application nos. 48059/06 and 2708/09, 10 May 2011, § 109; ECtHR, *Dimitrov and Hamanov v. Bulgaria*, application nos. 48059/06 and 2708/09, 10 May 2011, § 114; ECtHR, *Gazsó v. Hungary*, application no. 48322/12, 16 July 2015, § 31; ECtHR, *Gerasimov and others v. Russia*, application nos. 29920/05, 3553/06, 18876/10, 61186/10, 21176/11, 36112/11, 36426/11, 40841/11, 45381/11, 55929/11, 60822/11, 1 July 2014, § 218; ECtHR, *Manushaqe Puto and others v. Albania*, application nos. 604/07, 43628/07, 46684/07 and 34770/09, 31 July 2012, § 109; ECtHR, *Neshkov and others v. Bulgaria*; application nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, 27 January 2015, § 271; ECtHR, *Rumpf v. Germany*, application no. 46344/06, 2 September 2010, §62; ECtHR, *Varga and others v. Hungary*, application nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, 10 March 2015, § 100.

[196] Interview I dd 20.01.2017.

[197] ECtHR, *Broniowski v. Poland* (friendly settlement), application no. 31443/96, 28 September 2005, § 35.

[198] ECtHR, *Michelioudakis v. Greece*, application no. 54447/10, 3 April 2012, § 72 ; ECtHR, *Vassilios Athanasiou et autres v. Greece*, application no. 50973/08, 20 December 2010, § 52.

[199] ECtHR, *Kurić and others v. Slovenia*, application no. 26828/06, 26 June 2012, § 412.

[200] For Wildhaber's definition, see page 22 and further.

Puto v. Albania, the applicants even expressly requested the Court to not reserve the determination under article 41. They did so because they were very sceptical about the utility of the application of the pilot judgment procedure in itself. The Court had indeed already requested general measures under article 46 in previous leading cases in order to address the problem of non-enforcement of administrative decisions providing compensation for confiscated property. The Albanian government had reacted to this with "promises to draft unrealistic and ineffective action plans".[201] The Court granted the applicants' request and ordered the State to pay them just satisfaction.[202] The applicants had further specifically requested to not adjourn the already communicated cases, a request which was also granted by the Court.[203] One respondent explained this decision from the side of the Court and stated that they did not want to discriminate among the larger pool of victims. In order to be fair with everybody, they decided to keep dealing with the remaining cases submitted until the moment the judgment in Manushaqe Puto became final. For the other cases which might be brought after that moment, the Court would wait and see whether general measures would be put in place by the State. [204]

iii The decision to adjourn similar pending cases

The interests of the applicants of pending and future cases has become the most apparent in the Court's decision concerning the freezing of similar cases. As shown above, the Court will not always decide to adjourn pending or incoming cases.[205] It seems that in pilot cases involving sub-standard conditions of detention contrary to article 3 ECHR, the Court will refrain from adjourning pending cases.[206] For instance, it has refused to do so in the case of *Ananyev v. Russia* in which it clearly stated that it would be unfair to the other applicants if they, after having "*suffered through periods of detention in allegedly inhuman or degrading conditions and, in the absence of an effective domestic remedy, sought relief in this Court, were compelled yet again to resubmit their grievances to the domestic authorities, be it on the grounds of a new remedy or otherwise*." As a plus-side to the continued examination of pending similar cases, the Court considers that this would act as a constant reminder to the State to take the necessary measures.[207] The decision of the Court not to adjourn cases as a way to put pressure on the State to solve the underlying issue was also raised by a respondent at the Court.[208] Another respondent

[201] ECtHR, *Manushaqe Puto and others v. Albania*, application nos. 604/07, 43628/07, 46684/07 and 34770/09, 31 July 2012, § 99.
[202] ECtHR, *Manushaqe Puto and others v. Albania*, application nos. 604/07, 43628/07, 46684/07 and 34770/09, 31 July 2012, Point 9 operative part
[203] ECtHR, *Manushaqe Puto and others v. Albania*, application nos. 604/07, 43628/07, 46684/07 and 34770/09, 31 July 2012, §§ 99 and 121.
[204] Interview I dd 13.01.2017.
[205] For an overview over the varying practice in this regard, see the continuum of pilot and pilot-like cases starting from page 32.
[206] Apart from *Ananyev v. Russia*, the Court also did so in ECtHR, *Neshkov and others v. Bulgaria*; application nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, 27 January 2015, § 291; ECtHR, *Varga and others v. Hungary*, application nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, 10 March 2015, § 115; ECtHR, *Rezmiveş and others v. Romania*, application nos. 61467/12, 39516/13, 48231/13 and 68191/13, 25 April 2017, § 128 (where it only adjourned the non-communicated cases).
[207] ECtHR, *Ananyev and others v. Russia*, application nos. 42525/07 and 60800/08, 10 January 2012, §§ 236-237.
[208] Interivew anonymous I.

however questioned this idea by stating that "if the purpose is to encourage the State to quickly adopt general measures, then there is little sense in processing cases."[209]

This principled approach concerning the non-adjournment of article 3 issues is justified by the Court based on "*the fundamental nature of the right protected under article 3 and the importance and urgency of complaints about inhuman or degrading treatment*".[210] The Court does however sometimes adjourn cases involving article 3 claims, such as in *W.D. v. Belgium* and with respect to the non-communicated cases in *Torreggiani v. Italy*.[211] It has however not provided an express reasoning for deciding differently in these cases. With respect to the Torreggiani case, one respondent explained that these cases were adjourned because firstly, the cases would not have been dealt with within a year because of a shortage of Italian lawyers in the Registry and secondly, because positive steps are already being taken by the Italian government.[212] In short, due to the circumstances these cases would thus have been dealt with quicker nationally than at the Court. Contrary, in the case of *Greens and M.T. v. UK*, the Court assessed the applicants' interests in deciding to adjourn their pending cases. In this case, the Court found a violation based on a blanket ban for prisoners to vote. It then stated that it would not be detrimental to the applicants in similar cases to have their cases frozen. No individual examination of their cases is necessary, seeing the nature of the underlying issue. Furthermore, no financial compensation is necessary as the only real compensation possible in this instance is declaratory in nature.[213]

There does indeed not seem to be agreement within the Court concerning the question whether cases can or can't be adjourned when they involve article 3 violations. Some respondents at the Court opined that adjournment of pending cases has nothing to do with the underlying issue.[214] Others however take the principled approach that article 3 cases cannot be adjourned.[215] To put it in the words of one of the respondents: "*You cannot bargain the case if the applicant is not out of the violating conditions.*"[216] Adjourning or not adjourning further is based on the level of cooperation of the State involved[217], the national circumstances and the burden represented by the bulk of similar cases on the Court's docket[218].

iv Friendly settlements and unilateral declarations

In some cases, the Court hints towards the use of friendly settlements and unilateral declarations by the State concerning pending cases. The Court here clarifies that the State's action should

[209] Interview I dd 16.01.2017.
[210] ECtHR, *Varga and others v. Hungary*, application nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, 10 March 2015, § 116.
[211] ECtHR, *W.D. v. Belgium*, application no. 73548/13, 6 September 2016, § 174; ECtHR, *Torreggiani and others v. Italy*, application nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 et 37818/10, 8 January 2013, § 101.
[212] Interview II dd 17.01.2017.
[213] ECtHR, *Greens and M.T. v. UK*, application nos. 60041/08 and 60054/08, 23 November 2010, §§118-120.
[214] Interview anonymous III; Interview I dd 16.01.2017; Interview I dd 20.01.2017;
[215] Interview I dd 17.01.2017; Interview II dd 17.01.2017; Interview I 13.01.2017; Interview I dd 20.01.2017; Interview II dd 18.01.2017.
[216] Interview II dd 17.01.2017.
[217] Interview anonymous I.
[218] Interview I dd 16.01.2017.

primarily be aimed at finding a solution to the underlying systemic issue. However, in the meantime, it could also take what the court calls *ad hoc* solutions.[219] As friendly settlement procedures are intrinsically more a working method for the Court than they are a procedural tool for settlement[220], this suggestion seems to be the Court dividing responsibilities between itself and the States with respect to this group of applicants which have already come to the Court. The Court has mentioned this option both in cases where it has adjourned a group of pending cases – such as in *W.D. v. Belgium* and *Gaszó v. Hungary* - , as well as when it hasn't adjourned them. An example of the latter situation is the case of *Rutkowski v. Poland*, in which the Court had identified two systemic problems in the context of excessive length of procedures in Poland: the Polish court's fragmentation of procedures when calculating their length and the practical difficulties faced by the victims of these violations in securing compensation. The Court had indicated in its pilot judgment that it would not adjourn the pending cases but would instead offer the Polish State a term of two years to offer redress to this group of applicants, through friendly settlements or 'unilateral remedial offers'.[221] The Polish State then went forward with unilateral declarations comprising both individual and general measures.[222] The settlements put forward in these unilateral declarations were not accepted by all applicants. The applicants who did not accept argued before the Court that their cases involved particular circumstances which warranted they be awarded a significantly higher sum in compensation. The Court however emphasized that it is an international court whose "*principal task it is to secure the respect for human rights, rather than compensate applicants' losses minutely and exhaustively. Unlike in national jurisdictions, the emphasis of the Court's activity is on passing public judgments that set human rights standards across Europe*."[223] With this, the Court's seems to indicate that its role is constitutional rather than to provide individual financial relief.

e. Decisive factor in applying the pilot procedure: cooperation of the State?

From the way that the procedure is designed and the backdrop of heightened attention for the subsidiarity principle in the context of its creation, it is clear that the level of cooperation coming from the involved State will be decisive for its success.[224] The cooperation of national authorities is imperative in all cases before the Court, but with pilot judgments this element is

[219] For instance in ECtHR, *W.D. v. Belgium*, application no. 73548/13, 6 September 2016, § 173: "Pour les requérants présents et futurs, ce redressement peut être atteint grâce à des mesures ad hoc, qui pourront faire l'objet de règlements amiables ou de déclarations unilatérales, adoptés conformément aux exigences pertinentes de la Convention. » This is also the case in ECtHR, *Gazsó v. Hungary*, application no. 48322/12, 16 July 2015, § 40.

[220] More in-depth discussion concerning friendly settlements and unilateral declarations will follow below throughout chapter IV.

[221] ECtHR, *Rutkowski and others v. Poland*, application nos. 72287/10, 13927/11 and 46187/11, 7 July 2015, § 227.

[222] ECtHR decision, *Załuska and Rogalska v. Poland*, application nos. 53491/10 and 72286/10, 20 June 2017, §§ 23-25.

[223] ECtHR decision, *Załuska and Rogalska v. Poland*, application nos. 53491/10 and 72286/10, 20 June 2017, §§ 48 and 52.

[224] A. BUYSE, "Flying or landing? The pilot judgment procedure in the changing European human rights architecture" IN O.M. ARNARDÓTTIR, A. BUYSE, *Shifting Centres of Gravity in Human Rights Protection. Rethinkingg relations between the ECHR, EU , and national legal orders*, Routledge, 2016, 113.

even more important.[225] The pilot judgment procedure is in principle supported by the States parties of the Council of Europe, as evidenced by its endorsement in the Brussels Declaration.[226]

i Cooperation of State authorities

Contrary to this general expression of political endorsement, the willingness of governments to cooperate in specific pilot cases has been termed by *Luzius Wildhaber* as the procedure's most fundamental problem.[227] State cooperation takes up varying forms.

(i) State's initial reaction to the application of the pilot procedure in a specific case

From very early on, non-cooperation has been a factor taken into account by the Court. This is apparent from the practice, which eventually was written into the rule, of asking the parties to submit their views concerning the application of the procedure with the communication of the case.[228] States have reacted in different ways. In some cases, the State remained neutral. The Greek government for instance wished not to pronounce itself on the question of the application of the procedure in *Vassilios Athanasiou and others*.[229] The Italian government in *Torreggiani* simply stated that it was not opposing, simultaneously stressing that it was already doing something about the issue at hand.[230] The Bulgarian government in the *Neshkov* case recognized the issue with respect to sub-standard prison conditions. Unfortunately, the State immediately clarified that budgetary issues would stand in the way of bringing these conditions up to standard.[231]

However, when looking at the whole of the full pilots, it becomes clear that in 60% of cases, States oppose the application of the procedure.[232] They resist for different reasons. Mostly, these States argued that there was no problem at all[233], or that the nature of the issue was not systemic.

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[225] F. FAVUZZA, "*Torreggiani* and Prison Overcrowding in Italy", *Human Rights Law Review*, 2017, 127.
[226] High-level Conference on the "Implementation of the European Convention on Human Rights, our shared responsibility", Brussels Declaration, 25 March 2015, A.2.a).
[227] L. WILDHABER, "Discussion Following the Presentation by Luzius Wildhaber" in R. WOLFRUM, U. DEUTSCH, *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, International Workshop, Heidelberg, December 2007, 89.
[228] Rule 61.2 of the Rules of Court.
[229] ECtHR, *Vassilios Athanasiou et autres v. Greece*, application no. 50973/08, 20 December 2010, § 38.
[230] ECtHR, *Torreggiani and others v. Italy*, application nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 et 37818/10, 8 January 2013, § 81 ; the issue was already addressed by the Court in ECtHR, *Sulejmanovic v. Italy*, application no. 22635/03, 16 July 2009.
[231] ECtHR, *Neshkov and others v. Bulgaria*; application nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, 27 January 2015, §§ 258-260.
[232] Of 28 full pilot cases, states opposed in 17 cases. The position of the government concerning this issue remains unclear in the case of *Varga v. Hungary*, as the Government's submissions are not included in the judgment. The position of the Hungarian government in *Gaszó v. Hungary* is also not unambiguous. The Hungarian state does not formally oppose the procedure but does find it unnecessary as it had already submitted an action plan to the Committee of Ministers, see ECtHR, *Gazsó v. Hungary*, application no. 48322/12, 16 July 2015, § 27.
[233] ECtHR, *Gerasimov and others v. Russia*, application nos. 29920/05, 3553/06, 18876/10, 61186/10, 21176/11, 36112/11, 36426/11, 40841/11, 45381/11, 55929/11, 60822/11, 1 July 2014, § 209; ECtHR, *Hutten-Czapska v. Poland*, application no. 35014/97, 19 June 2006, § 228; ECtHR, *Suljagic v. Bosnia and Herzegovina*, application no. 27912/02, 3 November 2009, § 59; ECtHR, *Kurić and others v. Slovenia*, application no. 26828/06, 26 June 2012, §§ 402-404.

[234] Along with some other technical reasons[235], States also sometimes contended that the procedure in their case is not necessary as the problem was already solved on the national level or because remedies are already underway.[236]

(ii) The cooperation of the State as criterion to apply the pilot procedure

Next, the question can be raised whether the Court out of pragmatic considerations will take the will of States into account in deciding to apply the full pilot procedure, or merely resorting to the toned-down version of the quasi-pilot. In the *Sejdovic* case for instance, the Court decided not to apply the full pilot procedure because there were already new laws underway and it first wanted to see what the result of those new laws would be, a point raised by the Italian government.[237] In the end, it would however take over a decade for the case to be closed through a Final Resolution of the Committee of Ministers.[238] In the case of *Aslakhanova and others v. Russia* – a case concerning the lack of proper investigations into forced disappearances in Chechnya and Ingushetia – the Court concluded to not apply the full pilot procedure as well. As was the case in *Sejdovic*, the Court did say that the issue at hand was clearly systemic, for which there was no domestic remedy.[239] It did however recognize that the problems involved are too complex so that it was not in a position to order exact general and individual measures, nor to set a time-limit. Instead, the Court gave some guidance as to what direction these measures should go in and referred the matter to the Committee of Ministers to indicate in practical terms which measures would be required from the Russian State.[240] The *Aslakhanova* case from 2012 has not yet been executed by the Russian Government, with the Committee of Minister's last interim decision requesting the government for more information in order to

[234] ECtHR, *Glykantzi v. Greece*, application no. 40150/09, 30 October 2012, § 59; ECtHR, *Michelioudakis c Grèce*, application no. 54447/10, 3 April 2012 , § 56 ; ECtHR, *Burdov v. Russia (no. 2)*, application no. 33509/04, 15 January 2009, § 124; ECtHR, *Dimitrov and Hamanov v. Bulgaria*, application nos. 48059/06 and 2708/09, 10 May 2011, § 101; ECtHR, *Finger v. Bulgaria*, application no. 37346/05, 10 May 2011, § 105; ECtHR, *Rumpf v. Germany*, application no. 46344/06, 2 September 2010, § 58; ECtHR, *Rutkowski and others v. Poland*, application nos. 72287/10, 13927/11 and 46187/11, 7 July 2015, § 189, ECtHR, *Yuriy Nikolayevich Ivanov v. Ukraine*, application no. 40450/04, 15 October 2009, § 77.

[235] in *W.D. v. Belgium* (application no. 73548/13, 6 September 2016, § 157), the Government argued that this case needed to be distinguished from *Broniowski* and *Hutten-Czapska* since this did not encompass a defined 'class of individuals'; ECtHR, in *Greens and M.T. v. UK* (application nos. 60041/08 and 60054/08, 23 November 2010, § 104), in which the Government argued that the Court could not turn around on the margin of appreciation it had granted the UK in the earlier case of *Hirst v. UK*.

[236] ECtHR, *M.C. and others v. Italy*, application no. 5376/11, 3 September 2013,§ 107; ECtHR, *Gazsó v. Hungary*, application no. 48322/12, 16 July 2015, § 27; ECtHR, *Kurić and others v. Slovenia*, application no. 26828/06, 26 June 2012, § 402-404; ECtHR, *Rezmiveş and others v. Romania*, application nos. 61467/12, 39516/13, 48231/13 and 68191/13, 25 April 2017, § 97.

[237] ECtHR, *Sejdovic v. Italy*, application no. 56581/00, 1 March 2006, § 123.

[238] See "VI-a Cases open or closed + level of cooperation of the State (June 2004 - June 2017)" starting from page 215.

[239] ECtHR, *Aslakhanova v. Russia*, applications nos. 2944/06 and 8300/07, 50184/07, 332/08, 42509/10, 18 December 2012, § 217.

[240] ECtHR, *Aslakhanova v. Russia*, applications nos. 2944/06 and 8300/07, 50184/07, 332/08, 42509/10, 18 December 2012, § 220-221.

show that these forced disappearances are no longer taking place and past occurrences are being investigated.[241]

It has been argued in the literature that the Court will decide not to apply the pilot judgment procedure with respect to politically sensitive issues, by reason of safeguarding the State's discretionary powers on the one hand, and minimizing the risk of non-execution on the other.[242] It could thus be claimed that the reason why these quasi-pilot cases are not as successful as the full pilots is because the Court is tipping the scale in its favour beforehand. However, seeing the involved States' resistance to the application of the pilot judgment procedure mentioned above, this seems to be an argument that can easily be rebutted.

During the course of the interviews, it became abundantly clear that the level of cooperation of States is one of the primordial factors taken into account by the Registry to decide to propose a certain case for pilot judgment treatment.[243] One respondent explained that they will only take the risk of having to work through this heavy procedure when all criteria seem to be fulfilled, including the good will of the government. Since this kind of procedure is tough for the involved lawyers and time-consuming for all parties involved, there is a need to anticipate the results of the pilot procedure.[244]

ii Involvement of domestic Constitutional and Supreme Courts

In eight of the full pilot cases, the Court refers to the findings of national Constitutional and Supreme Courts confirming the existence and the systemic nature of problem at the national level.[245] In the *Broniowski* case, the Polish Constitutional Court had already marked the Bug River legislation as "causing an inadmissible systemic dysfunction", a wording which was used by the Court to show the systemic nature of the issue in front of it.[246] Furthermore, in the case of *Hutten-Czapska v. Poland*, the Court even refers to the recommendations made by the Polish Constitutional Court in its indication of general measures to the State.[247] Half of these cases

[241] Committee of Ministers, Decisions, Supervision of the execution of the European Court's judgments, *H46-24 Khashiyev and Akayeva group v. Russian Federation*, CM/Del/Dec(2017)1280/H46-24, 10 March 2017.
[242] E. LAMBERT ABDELGAWAD, "The Execution of the Judgments of the European Court of Human Rights: Towards a Non-oercive and Participatory Model of Accountability", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2009, 475-476; J.F. FLAUSS, "Actualité de la CEDH", *AJDA*, March-August 2007, 1918-1919.
[243] Interview anonymous III; Interview II dd 13.01.2017; Interview II dd 18.01.2017; Interview dd 9.01.2017; Interview I dd 17.01.2017; Interview II dd 17.01.2017; Interview anonymous I; Interview dd 20.01.2017; Interview anonymous II; Interview I dd 18.01.2017; Interview dd 19.01.2017; Interview dd 12.01.2017; Interview dd 9.01.2017.
[244] Interview II dd 20.01.2017.
[245] ECtHR, *Broniowski v. Poland*, application no. 31443/96, 22 June 2004, § 189; ECtHR, *M.C. and others v. Italy*, application no. 5376/11, 3 September 2013, § 119; ECtHR, *Kurić and others v. Slovenia*, application no. 26828/06, 26 June 2012, § 408; ECtHR, *Burdov v. Russia (no. 2)*, application no. 33509/04, 15 January 2009, § 139; ECtHR, *Hutten-Czapska v. Poland*, application no. 35014/97, 19 June 2006, §§ 237 and 239; ECtHR, *Varga and others v. Hungary*, application nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, 10 March 2015, § 30; ECtHR, *Rutkowski and others v. Poland*, application nos. 72287/10, 13927/11 and 46187/11, 7 July 2015, § 105; ECtHR, *Manushaqe Puto and others v. Albania*, application nos. 604/07, 43628/07, 46684/07 and 34770/09, 31 July 2012, § 58.
[246] ECtHR, *Broniowski v. Poland*, application no. 31443/96, 22 June 2004, § 189.
[247] ECtHR, *Hutten-Czapska v. Poland*, application no. 35014/97, 19 June 2006, § 239 in fine.

have already been executed.[248] The other four cases are considerably new.[249] It seems thus that the involvement of a national Constitutional or Supreme Court might have a positive influence on the level of cooperation or willingness to execute of the involved States.

One respondent emphasized the importance of the national Constitutional Courts in several pilot and quasi-pilot cases and how the Court has benefitted from their involvement:

> *"This is visible in Broniowski and also in Burdov (no.2). In both pilot judgment procedures, we see that the role of the constitutional court was extremely important. In Broniowski, it was the constitutional court of Poland who was involved in the development of the national legislation as a tool for overcoming the systemic problem. Another positive example of dialogue between a national court and our Court is the semi-pilot judgment of Lukenda v. Slovenia. The first signals for systemic problems were in fact raised by the constitutional court of Slovenia at that time. This is visible also in Kuric, because it was the constitutional court who raised the problem of national legislation which is not in line with human rights . And for us, these elements were a perfect basis in our analysis. These are for me best examples of a pilot judgment procedure."*[250]

f. Conclusion: the decision to apply the pilot judgment procedure

It is evident from the above that the Court takes into account a myriad of factors when deciding to apply the pilot judgment procedure. This is due to the fact that the pilot judgment procedure brings many viewpoints and dynamics together.

Firstly, the nature of the issue involved is relevant if it creates or is capable of creating a high influx of similar cases. This need for efficiency prompts the Court to address it in an efficient manner. Out of efficiency considerations, the Court does not want – nor is it able – to address all of these cases individually. It does thus seem that the numbers play an important role in the Court's decision to apply the pilot judgment procedure.

Secondly, seeing that the principle of subsidiarity underpinning the Convention states that securing the protection of human rights is first and foremost the duty of the States, it is a useful ally in deciding to apply the procedure. The Court uses this reasoning in order to shift responsibility back to the States. In this manner, it is making sure that it can guard its own role of setting human rights standards for the Council of Europe Member States, rather than affording individual financial relief similar to a small-claims court.

Thirdly, the applicants' interests come into play more out of moral considerations. A certain faction within the Court is for instance convinced that similar applications may not be adjourned

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[248] See "VI-a Cases open or closed + level of cooperation of the State (June 2004 - June 2017)" starting from page 215.

[249] The case of *M.D. and others v. Italy* dates from September 2013, *Varga v. Hungary* was pronounced in March 2015; the judgment in *Rutkowski v. Poland* was rendered in July 2015; and *Manushaque Puto v. Albania* dates from July 2012. With respect to this last case, the Committee of Ministers seems to be satisfied with the legislation put in place and is currently awaiting further information from the state, see Committee of Ministers, Decision, Supervision of the execution of the Court's judgments, *Manushaqe Puto and others and Driza group v. Albania*, CM/Del/Dec(2015)1243/H46-1, 9 December 2015.

[250] Interview dd 12.01.2017.

in article 3 cases. The Court has further termed the pilot judgment procedure as the most speedy and effective solution for the victims of large-scale human rights violations. The rights of the larger victim pool are further linked to it's own efficient functioning through the solving of the underlying systemic problem. When the underlying problem is solved and the State is asked to set up a domestic remedy for the persons already harmed, this larger victim pool is addressed while the Court is also not confronted with an influx of similar cases anymore.

Lastly, the cooperation of the State however is a factor which is not expressly mentioned in the case law but is highly decisive, based on the empirical data. The Court will not risk its own legitimacy due to persistent non-execution, as well as the hard work needed to bring this procedure to a good end. All of these factors have their role to play in the decision of the Court to apply the procedure.

2. The choice of the specific pilot case

When the Court considers to apply the pilot judgment procedure in a certain situation, it will select a case through which to diagnose the issue. There is no known procedure through which the Court officially selects a pilot. Further, from the interviews in Strasbourg it turns out that there are multiple criteria which come into play in this decision.

a. One pilot or a combination of cases?

In twelve of the twenty-eight full pilot cases, the Court has selected a combination of cases to serve as the pilot in that instance.[251] Focussing on a selection of cases, rather than betting on one horse thus seems to be part the Court's general practice.[252]

The reasons for choosing to select a combination of cases vary. In the case of *Kurić v. Slovenia*, the selection of multiple cases proved important. The lead applicant originally was a Mr. Makuc. He however died, resulting in Mr. Kurić becoming the lead applicant.[253] In the *Gerasimov* case, the Court revealed another reason to elect multiple cases to act as the pilot. It specified that it had chosen a selection of cases in order to reflect the underlying systemic issue

[251] ECtHR, *Torreggiani and others v. Italy*, application nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 et 37818/10, 8 January 2013, § 1; ECtHR, *Ananyev and others v. Russia*, application nos. 42525/07 and 60800/08, 10 January 2012, § 1; ECtHR, *Dimitrov and Hamanov v. Bulgaria*, application nos. 48059/06 and 2708/09, 10 May 2011, § 1; ECtHR, *Gerasimov and others v. Russia*, application nos. 29920/05, 3553/06, 18876/10, 61186/10, 21176/11, 36112/11, 36426/11, 40841/11, 45381/11, 55929/11, 60822/11, 1 July 2014, § 1; ECtHR, *Greens and M.T. v. UK*, application nos. 60041/08 and 60054/08, 23 November 2010, § 1; ECtHR, *Manushaqe Puto and others v. Albania*, application nos. 604/07, 43628/07, 46684/07 and 34770/09, 31 July 2012, § 1; ECtHR, *Maria Athanasiu and others v. Romania*, application nos. 30767/05 and 33800/06, 12 October 2010, §1; ECtHR, *Neshkov and others v. Bulgaria*; application nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, 27 January 2015, §1; ECtHR, *Olaru and others v. Moldova*, application nos. 476/07, 22539/05, 17911/08 and 13136/07, 28 July 2009, § 1; ECtHR, *Rutkowski and others v. Poland*, application nos. 72287/10, 13927/11 and 46187/11, 7 July 2015, § 1; ECtHR, *Varga and others v. Hungary*, application nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, 10 March 2015, § 1; ECtHR, *Kurić and others v. Slovenia*, application no. 26828/06, 26 June 2012, §1.

[252] European Court of Human Rights, *Factsheet – Pilot judgments*, April 2017, http://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf.

[253] ECtHR, *Kurić and others v. Slovenia*, application no. 26828/06, 26 June 2012, §1.

better.[254] The Court specified that its selection of cases in this case represented a variety of situations, the vulnerability of the people affected by them, the vast territory of Russia on which the same recurrent problems arise and the persistence of those problems in time.[255] This preference to combine some cases in order to create a pilot was affirmed by several respondents in Strasbourg.[256]

b. Criteria for selecting the pilot(s).

The criteria for selecting a pilot case were discussed during the interviews in Strasbourg, which resulted in a myriad of different parameters which are taken into account. One respondent defined the right case as a case which illustrates the underlying problems, is not going to be lost for failure to comply with the six month rule[257] and in which the applicants are legally represented.[258] Another respondent focusses on the following questions: how important was the case on the national level; how well is it defended; is the core violation in the centre of the complaint? The considerations thus seems to centre on technical criteria.[259] Another respondent with considerable experience explained the thought-process as follows:

> *"We choose cases so that we deal with all particular problems which might arise. We deal with them in one judgment but we cover all legal issues that might come in follow-up cases. This is the main criterion. We choose the best example! We even pay attention to the name of the applicants. We also check whether the applicant is represented by a lawyer and we look at the quality of the application submitted."*[260]

Legal representation as a criterion was mentioned by others as well.[261] However, there is no agreement on this. Some respondents expressly denied that legal representation or the quality thereof played a role in the selection of a case as the pilot.[262]

The level of representation offered by the pilot case might pose problems in practice. For instance, in the case of *Hutten-Czapska v. Poland*, the government argued against the pilot procedure claiming that the chosen case was not representative of the problem at hand.[263] One respondent explained in this context:

> *"The governments are never pleased with the choice of case. When you follow the observations, you will see that generally they contest the application of the pilot judgment*

[254] ECtHR, *Gerasimov and others v. Russia*, application nos. 29920/05, 3553/06, 18876/10, 61186/10, 21176/11, 36112/11, 36426/11, 40841/11, 45381/11, 55929/11, 60822/11, 1 July 2014, § 213.
[255] ECtHR, *Gerasimov and others v. Russia*, application nos. 29920/05, 3553/06, 18876/10, 61186/10, 21176/11, 36112/11, 36426/11, 40841/11, 45381/11, 55929/11, 60822/11, 1 July 2014, § 213.
[256] Interview II dd 17.01.2017; Interview I dd 13.01.2017; Interview II dd 13.01.2017; Interview III dd 13.01.2017; Intrview I dd 16.01.2017; Interview II 20.01.2017; Interview II dd 16.01.2017; Interview dd 19.01.2017; Interview dd 09.01.2017.
[257] The six months rule is an admissibility criterion laid down in article 35 of the ECHR which specifies that a case will only be found admissible if it is submitted to the Court within six months from the last final domestic decision.
[258] Interview I dd 17.01.2017.
[259] Interview II dd 13.01.2017.
[260] Interview III 13.01.2017.
[261] Interview II 20.01.2017; Interview II dd 16.01.2017; Interview dd 9.01.2017; Interview II dd 13.01.2017; Interview III dd 13.01.2017; Interview I dd 18.01.2017.
[262] Interview I dd 20.01.2017; Interview II dd 18.01.2017.
[263] ECtHR, *Hutten-Czapska v. Poland*, application no. 35014/97, 19 June 2006, § 228.

procedure. One of the arguments is that the case does not reveal a typical situation. You will find it in Hutten-Czapska. So the best solution to my mind is to select a few cases. That's why on the list [of pilot cases] you will see there is always a second or third case. This is a question of certain prudence."[264]

In conclusion, the Court tends to select a group of cases which reflect the underlying system well in all its facets. In selecting this group, the Court mostly focuses on technical criteria, such as the admissibility of the case, whether the applicants have legal representation and sometimes even whether that legal representation delivers qualitative submissions concerning the systemic nature of the underlying issue.

C. Creation of the pilot judgment procedure in the context of reforming the ECtHR

The interviews clarified that there are roughly two ways of looking at the pilot judgment procedure. One group of respondents, largely represented among judges, put pilots in the middle of a larger debate concerning the role of the Court: they focus on the idea that the Court cannot be obliged to render the same judgment over and over again concerning a matter which should have been dealt with nationally. This stance puts the emphasis on subsidiarity and the division of roles in the Council of Europe reflected in article 46 of the Convention.[265] One respondent expressed this idea as follows:

"From what I witnessed of its inception, it would not be accurate to say that the pilot-judgment procedure was dreamt up solely as a managerial tool to ease the workload, to help the Court have an easier time. In my view, the pilot-judgment procedure represents a more faithful reflection, in procedural terms, of what the real mission of the Court is. It's not just a cynical, grey-suited manager's or accountant's solution for cost-cutting. The presentation one sometimes hears is that, whereas the Court should be rendering justice to victims, instead these awful accountants and budget-managers have come in and polluted the system. I do not share that analysis at all. […]for me, to conceive of the purpose of the pilot-judgment procedure as being no more than achieving efficient case-management is somewhat inaccurate. I would prefer to say that its overall purpose is to achieve better justice within the limits of the Convention system of human rights protection, including the most effective justice for the all the multiple victims of systemic violations of the Convention."[266]

Another group of respondents within the Court regard the pilot judgment procedure rather as a working method that is meant to help reduce the Court's caseload. This viewpoint is mostly represented under registry lawyers and is best reflected in the words of another respondent:

"I still think that this is one of the best working methods recently developed by the Court […]. It helps a lot, not only in overcoming the huge number of applications that are arriving

[264] Interview I dd 16.01.2017
[265] The principle of subsidiarity and the division of competences between Council of Europe bodies will be explained under "Placing the pilot judgment procedure in its institutional context" starting from page 81.
[266] Interview anonymous II.

in front of the Court and applications that are deriving from the same factual or situations, linked with structural problems or systemic problems."[267]

It is not clear where the idea for the pilot judgment procedure originated from. From the perspective of the outsider, the procedure seems to emerge out of nowhere. Even for persons working inside the Court, it came as a surprise.[268] It is however important to know where the procedure originated from, which body took the initiative, what the original goals were and whether the procedure still lives up to those goals.

More specifically, as these two viewpoints show, the idea behind the procedure matters when translating it in practice. They differ as to the goals that are strived towards, mostly with respect the applicants in these cases. It is clear that the interests of the victims of these large-scale human rights violations in both points of view are not of primary importance. The weight that they receive however seems to differ depending on the perspective taken towards the pilot judgment procedure in the larger context of the current workings of the Court.

In order to uncover the purpose behind the pilot judgment procedure and thus the philosophy with which it is applied in certain situations, it is important to ascertain where and why the procedure was created. Although from an outside perspective it seems to emerge from nowhere, when taking a closer look behind the scenes it appears that different evolutions came together, culminating in the creation of the pilot procedure.

1. Creation of the Court? Case law developments leading to the pilot judgment procedure

From the side of the Court, the pilot judgment procedure did not come out of nowhere. In its jurisprudence, the Court has followed an evolution towards the *Broniowski* case law.

a. Structural problems in the Court's case law

The focus of the Court on structural or recurring issues started with the famous length of proceedings cases in Italy, a problem which plagued Italy for years on end and which ended up flooding the Court.[269] In the case of *Bottazzi v. Italy*, the Court for the first time emphasized the recurring nature of the issue at hand and labelled it as a practice inconsistent with the Convention.[270] This is interesting since this kind of wording is also used later on in pilot judgments. However, the Court did not yet decide to attach any procedural consequence to this and handled the case like any other.

At the time of the *Bottazzi* case, there were 14 000 similar cases pending before the Court. However, because the Registry did not have the capacity to deal with them, they were not even

[267] Interview dd 12.01.2017.
[268] Interview I dd 16.01.2017.
[269] ECtHR, *Scordino (no. 1) v. Italy*, application no. 36813/97, 29 March 2006; § 174; L. WILHABER, "Pilot Judgments in Cases of Structural or Systemic Problems on the National Level" in R. WOLFRUM, U. DEUTSCH, *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, International Workshop, Heidelberg, December 2007, 69; D. HAIDER, *The Pilot Judgment Procedure of the European Court of Human Rights*, Martinus Nijhoff Publishers, 2013, 16.
[270] ECtHR, *Bottazzi v. Italy*, application no. 34884/97, 28 July 1999, §22.

communicated to the Government.[271] This can be termed as an unofficial adjournment of the pending cases. The result is the same, meaning that these cases are not handled for a certain period of time. The parties however do not receive a communication, meaning that they do not receive information concerning the case.[272] These first length of proceedings cases in Italy eventually led to the Pinto law, which was meant to remedy the issue by awarding compensation to the persons affected. The transitional provisions of this Pinto law offered applicants, who already brought their case to the Court but whose case was not yet declared admissible, the possibility to come back to Italy to claim compensation. This provision, in turn, was used by the Court to declare new cases inadmissible on the ground of non-exhaustion of domestic remedies, in casu repatriating cases back to the national system.[273] These 14 000 pending cases were then de facto sent back to Italy, for the applicants to exhaust this new remedy.[274] The issue however came back to the Court in the form of a quasi-pilot case with the case of *Scordino (no. 1) v. Italy*, in which the Court found that the compensation offered under the Pinto law was inadequate and that the Pinto law was not efficient to remedy the underlying issue of the excessive length of proceedings in Italy.[275]

In the case of *Kudła v Poland*, the Court for the first time found a violation explicitly because there was no domestic remedy. The Court made it clear that without such a domestic remedy "*individuals will systematically be forced to refer to the Court in Strasbourg complaints that would otherwise, and in the Court's opinion more appropriately, have to be addressed in the first place within the national legal system. In the long term the effective functioning, on both the national and international level, of the scheme of human rights protection set up by the Convention is liable to be weakened*."[276] With this case, subsidiarity-reasoning had found its way in the Court's jurisprudence, but the Court did not yet indicate binding general measures for the State to fulfil its duty based on the principle of subsidiarity. The length of proceedings issue in Poland later came back in the pilot case of *Rutkowski v. Poland*, in which the Court decided that the measures introduced after Kudła were effective in principle but showed some lacunae in practice.[277]

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[271] P. MAHONEY, "Discussion Following the Presentation by Luzius Wildhaber" in R. WOLFRUM, U. DEUTSCH, *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, International Workshop, Heidelberg, December 2007, 84.

[272] This way of working is also employed in pilot cases, this has been termed in the interviews by some respondents as an unofficial adjournment.

[273] D. HAIDER, *The Pilot Judgment Procedure of the European Court of Human Rights*, Martinus Nijhoff Publishers, 2013, 19.

[274] P. MAHONEY, "Discussion Following the Presentation by Luzius Wildhaber" in R. WOLFRUM, U. DEUTSCH, *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, International Workshop, Heidelberg, December 2007, 84.

[275] ECtHR, *Scordino v. Italy (No. 1)*, application no. 36813/97, 29 March 2006; L. WILHABER, "Pilot Judgments in Cases of Structural or Systemic Problems on the National Level" in R. WOLFRUM, U. DEUTSCH, *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, International Workshop, Heidelberg, December 2007, 73; D. HAIDER, *The Pilot Judgment Procedure of the European Court of Human Rights*, Martinus Nijhoff Publishers, 2013, 19.

[276] ECtHR, *Kudła v Poland*, application no. 30210/96, 26 October 2000, §155; D. HAIDER, *The Pilot Judgment Procedure of the European Court of Human Rights*, Martinus Nijhoff Publishers, 2013, 20.

[277] ECtHR, *Rutkowski and others v. Poland*, application nos. 72287/10, 13927/11 and 46187/11, 7 July 2015, § 5; HUDOC Exec, *Kudła v. Poland,* application no. 30210/96, available at:

b. The need for the State to offer structural solutions

At the same time, the Court also started to restrict the choice of means for States to offer redress for a certain violation. For instance, in the case of *Papamichalopoulos and others v. Greece*, the Court had ordered the Greek State to return property to the applicant.[278] Further, in *Assanidze v. Georgia*, it ordered the State to release the applicant who was illegally detained.[279] These were still individual measures, but they were already made binding on the State in the operative part of the judgment.

The first time that the Court found that a State has the obligation to remedy a violation under the terms of '*restitutio in integrum'*, including general measures, was in the case of *Scozzari and Giunta v. Italy*.[280] In the case, the Court used the following words, in which the ground work for *Broniowski v. Poland* is laid:

> *"The Court points out that by Article 46 of the Convention the High Contracting Parties undertook to abide by the final judgments of the Court in any case to which they were parties, execution being supervised by the Committee of Ministers. It follows, inter alia, that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects. Furthermore, subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment."*[281]

It is clear from this wording that the Court acknowledges here that merely pecuniary compensation is not always sufficient to provide redress to the victims of human rights violations.[282] The Court indeed next posed that pecuniary compensation is only appropriate to repair damage that cannot otherwise be repaired.[283] It is thus a secondary means of providing redress to the victims of human rights violations.[284]

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http://hudoc.exec.coe.int/eng#{"fulltext":["kudla v poland"],"EXECDocumentTypeCollection":["CEC"],"EXECIdentifier":["004-39849"]}.

[278] ECtHR, *Papamichalopoulos and others v. Greece*, application no. 14556/89, 31 October 1995, Operative part point 2. The restitution of property was later also ordered in the cases of Brumarescu v. Romania and Vasiliu v. Romania; ECtHR, *Brumarescu v. Romania*, application no. 28342/95, 23 January 2001; ECtHR, *Vasiliu v. Romania*, application no. 29407/95, 21 May 2002.

[279] ECtHR, *Assanidze v. Georgia*, application no. 71503/01, 8 April 2004, Operative part point 14 a).

[280] ECtHR, *Broniowski v. Poland*, application no. 31443/96, 22 June 2004, Concurring Opinion of Judge Zupančič; N. FRANGAKIS, "Systemic Human Rights Violations in the Jurisprudence of the European Court of Human Rights", *Nomika Vima (Greek Law Journal)*, 2009, 131.

[281] ECtHR, *Scozzari and Giunta v. Italy*, application nos. 39221/98 and 41963/98, 13 July 2000, § 249.

[282] N. FRANGAKIS, "Systemic Human Rights Violations in the Jurisprudence of the European Court of Human Rights", *Nomika Vima (Greek Law Journal)*, 2009, 132.

[283] ECtHR, *Scozzari and Giunta v. Italy*, application nos. 39221/98 and 41963/98, 13 July 2000, § 250.

[284] N. FRANGAKIS, "Systemic Human Rights Violations in the Jurisprudence of the European Court of Human Rights", *Nomika Vima (Greek Law Journal)*, 2009, 132.

The *Broniowski* contentieux ultimately brought these two evolutions together, meaning on the one hand the emphasis on the large-scale nature of certain issues and on the other, the need for the State to offer structural solutions.

2. Zooming in – the political context leading to the pilot judgment procedure

This case law evolution at the Court did not take place in a vacuum. The creation of the pilot judgment procedure must be placed in the context of a larger political debate concerning the future of the Court and the Council of Europe in general.

a. The Court's case-load problem

It has been stated multiple times in the literature that the European Court of Human Rights has been the victim of its own success.[285] Since its conception, the amount of pending cases has consistently increased, with an absolute peak of 151 600 pending cases in 2011. Only after 2011, the burden on the Court's docket has decreased *(see Chart 1)*.[286] It must be noted that the numbers are again increasing. This is largely due to current large-scale issues in three States: Hungary and Romania, for complaints concerning prison conditions and Turkey, for complaints concerning the failed coup d'état of July 2016.[287] The source of the recent dramatic decline in numbers is unclear. It could be hypothesized that the judgment of *Burmych v. Ukraine* which did away with 12 413 pending cases has its role to play in this.[288]

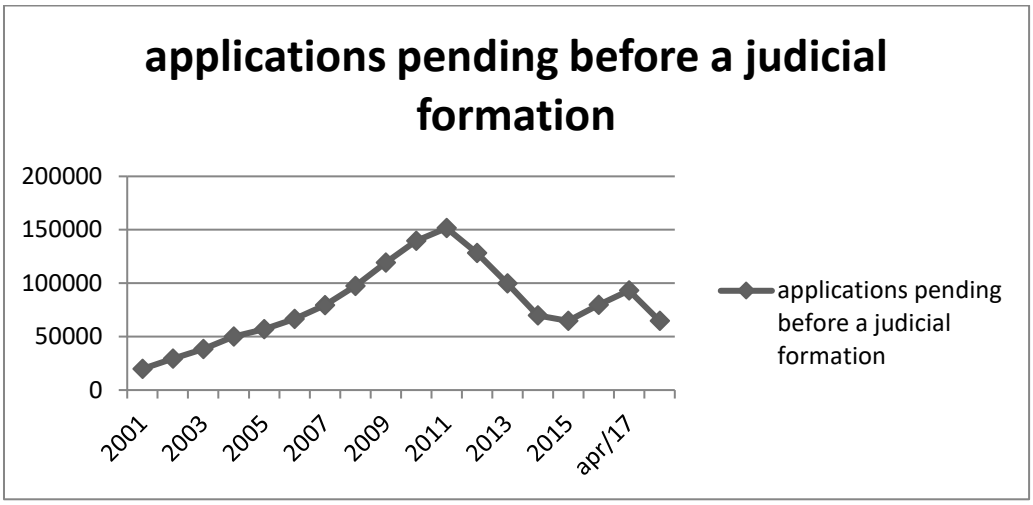
[285] ECtHR, *10 years of the "new" European Court of Human Rights 1998-2008. Situation and outlook: Proceedings of the Seminar 13 October 2008 Strasbourg*, European Court of Human Rights, 2009, p. 18; L. R. HELFER, "Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime", 19 *European Journal of International Law*, 2008, 126; K. DZEHTSIAROU, A. GREENE, "Legitimacy and the Future of the European Court of Human Rights: Critical Perspectives from Academia and Practitioners", 12 *German Law Journals*, 2011, 1708; J. CHRISTOFFERSEN, M.R. MADSEN (eds.), *The European Court of Human Rights between Law and* Politics, Oxford University Press, 2011, 229; S. MARINGELE, *European Human Rights Law. The work of the European Court of Human Rights illustrated by an assortment of selected cases*, Anchor Academic Publishing, 2014, 39; B. RAINEY, E. WICKS, C. OVEY, *The European Convention on Human Rights*, Oxford University Press, 2014, 53

[286] European Court of Human Rights, *Analysis of Statistics 2014*, January 2015, p. 7, http://www.echr.coe.int/Documents/Stats_analysis_2014_ENG.pdf.

[287] Registrar of the European Court of Human Rights, *Press Release - President Raimondi presents the Court's results for 2016*, ECHR 037 (2017), 26 January 2017.

[288] In April 2017, 93 150 cases were pending before the Court, 55.9% of which originate from Turkey, Ukraine and Hungary. By the end of October 2017, the numbers have dropped to 64 650 pending cases, with the top three of responsible states being Hungary, Romania and Turkey. Ukraine has dropped to the fifth place. This further supports the assumption that Burmych has a role to play in this drop in pending cases.

II.3 APPLICATIONS PENDING BEFORE A JUDICIAL FORMATION 2000 - 2017[289]



This first increase in the Court's caseload has been predominantly linked with the accession of new member States, mostly Eastern European States, in the 1990's.[290] They have indeed had a considerable share in the Court's caseload. Since its conception in 1959, almost half of the judgments delivered by the Court have concerned 5 States: Turkey, Italy, Russia, Romania, and Poland.[291] As of January 2018, 56 250 cases were pending before the Court, 44.7% of which originate from Romania, Turkey and Russia[292] Moreover, many of the Court's pending cases are repetitive, which means that they stem from the same systemic issues in a given State.[293] This increasing caseload has inspired the European Human Rights System to rethink its procedures. It is incumbent to emphasize that the European Court is not doing these efforts in a vacuum. These reforms are carried out and pushed forward by the various Council of Europe bodies with a strong partaking of the Committee of Ministers. It is within this reform context that the conception of the pilot judgment procedure must be situated.

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[289] European Court of Human Rights, *Analysis of Statistics 2014*, January 2015, p. 7, http://www.echr.coe.int/Documents/Stats_analysis_2014_ENG.pdf; ; European Court of Human Rights, *The European Court of Human Rights in Facts & Figures 2015*, March 2016, 3, http://www.echr.coe.int/Documents/Facts_Figures_2015_ENG.pdf; European Court of Human Rights, *The European Court of Human Rights in Facts & Figures 2016*, March 2017, 3, http://www.echr.coe.int/Documents/Facts_Figures_2016_ENG.pdf; European Court of Human Rights, *Pending Applications Allocated to a Judicial Formation*, 30 April 2017, http://www.echr.coe.int/Documents/Stats_pending_2017_BIL.pdf.

[290] P. LEACH, H. HARDMAN, S. STEPHENSON, B.K. BLITZ, *Responding to Systemic Human Rights Violations. An Analysis of 'Pilot Judgments' of the European Court of Human Rights and their Impact at National Level*, Intersentia, 2010, p. 9; Evaluation Group, *Report of the evaluation Group to the Committee of Ministers on the European Court of Human Rights*, EG Court(2001)1, 27 September 2001, 16; C. DUBOIS, E. PENNINCKX, *La procédure devant la Cour européenne des Droits de l'Homme et le Comité des Ministres*, Wolters Kluwer, 2016, 299; Interview dd 11.01.2017; Interview dd 17.01.2017; Interview 23.02.2017.

[291] European Court of Human Rights, *The ECHR in Facts & Figures 2014,* February 2015, p.4, http://www.echr.coe.int/Documents/Facts_Figures_2014_ENG.pdf.

[292] European Court of Human Rights, *Pending Applications Allocated to a Judicial Formation*, 1 January 2018, http://echr.coe.int/Documents/Stats_pending_2018_BIL.pdf.

[293] European Court of Human Rights Press Unit, *Factsheet – Pilot Judgments*, July 2015, p.1, http://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf.

b. *The interplay between the Committee of Minister's Evaluation Group and the CDDH's Reflection Group*

The first sign of an idea in the direction of a pilot judgment procedure within the Council of Europe machinery can be found in the early 2000s. To mark the 50th anniversary of the opening for signature of the Convention, the Council of Europe organized a European Ministerial Conference in Rome in 2000. One of the themes on the agenda was then ensuring the effectiveness of the Court, since concerns about this were already being voiced internally and following an audit by the Council of Europe's Internal Auditor who predicted a further increase in the numbers.[294] This Conference adopted a Declaration which explicitly warned for the ever increasing number of applications and emphasized that there was an urgent need to take measures in order to ensure the Court's effective functioning in the future. To this end, an in-depth reflection on the different possibilities was said to start to achieve this goal.[295] As a result, in February 2001, the Ministers' Deputies within the Committee of Ministers set up an Evaluation Group on the one hand while on the other hand, the Steering Committee for Human Rights (CDDH) set up a Reflection Group on the Reinforcement of the Human Rights Protection Mechanism. Both groups were created to consider ways of guaranteeing the effectiveness of the European Court of Human Rights. This Reflection Group first submitted its Activity Report to the Evaluation Group in June 2001, after which the latter handed down its report in September 2001.[296] The further interplay between the Committee of Ministers in general and the CDDH, a body set up by the Committee,[297] will prove instrumental in the creation of the pilot judgment procedure.

The Activity Report of the CDDH's Reflection group took some specific parameters in account to underpin its list of possible measures. Firstly, the proposed measures had to effectively lead to a reduction of the influx of cases, to an increase in the Court's output of cases, or to both. Secondly, the principle of subsidiarity had to be firmly maintained. Thirdly, any measures were to improve the effectiveness of the system, they could not weaken it. Fourthly, all individuals within the jurisdiction of the Court needed still be able to enjoy the same protection, without geographical distinction.[298] As a general remark then, the Activity Report advanced the idea that, although the aim of the report was not to discuss possible national measures, it would be important to think about building more incentives into the system "*for national authorities, in particular the courts, to assume fully their prime responsibility to respect and protect the ECHR rights*". It thus firmly emphasizes the importance of national authorities to take up their tasks

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[294] Evaluation Group, *Report of the evaluation Group to the Committee of Ministers on the European Court of Human Rights*, EG Court(2001)1, 27 September 2001, 11.
[295] European Ministerial Conference on Human Rights, *The European Convention on Human Rights at 50: What future for human rights protection in Europe?*, Rome, 3-4 November 2000, http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/dh_gdr/Declaration-Rome_en.pdf.
[296] Steering Committee for Human Rights, *Guaranteeing the long-term effectiveness of the European Court of Human Rights – Implementation of the Declaration adopted at its 112th Session (14-15 May 2003)*, CDDH(2004)004 Final, 13 April 2004, §. 3.
[297] Committee of Ministers, *Terms of reference of the CDDH and its subordinate bodies for the biennium 2016–2017*, CM(2015)131-addfinal, 2 December 2015.
[298] Steering Committee for Human Rights, *Reflection Group on the reinforcement of the human rights protection mechanism*, CDDH-GDR(2001)10, 15 June 2001, 3.

in the context of the principle of subsidiarity.[299] The Activity Report discusses the issue of "clone cases" – as they were labelled then – under the heading of the execution of judgments. It then specifies that the Court could include general measures in its judgments that need to be adopted as soon as possible by the Respondent State. It further uttered the idea of having the Committee of Ministers signalling particular interpretation issues to the Court, which can then enable it to put subsequent cases which are capable of clarifying this issue on a fast track.[300]

Subsequently and based on this previous Activity Report, the Evaluation Group submitted its report to the Committee of Ministers in September 2001. In this report, it devoted special attention to the increasing case-load of the Court, including an emphasis on repetitive applications.[301] However, it proposed a considerably different approach than the later created pilot judgment procedure. Firstly, seeing the delicate interplay between the different Council of Europe bodies as evidenced in article 46 of the Convention, the Evaluation Group was not a proponent of the idea that the Court should give in its judgments a more precise indication of the measures to be taken by the Respondent States. The report stressed that States enjoy freedom in choosing the specific measures under the supervision of the Committee of Ministers. [302] As a result, the Evaluation Group placed more responsibilities concerning these repetitive cases with the Committee of Ministers. This was their proposal:

> "*On being informed by the Registry of the Court of the existence of the pending applications, the Committee of Ministers would deal with the execution of the original judgment by a special procedure allowing for the expedited treatment; the pending applications would be "frozen" by the Court for a given period, but subject to regular review, to allow time for the necessary measures to be taken by the Respondent State. This procedure would enable the Committee of Ministers to exert special pressure on the State concerned and could reduce the need for the Court to deliver a series of purely repetitive judgments on the merits."*[303]

It is clear that the onus for action taken concerning repetitive cases would thus need to fall with the Committee of Ministers. The Evaluation Group further emphasized the need for the Committee of Ministers and the Parliamentary Assembly to use every tool they have in their toolbox: "*additional publicity for difficult cases might be one means; complementary examination of structural problems by the Council of Europe's political and parliamentary monitoring procedures might be another."* Indeed, it said that the Parliamentary Assembly

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[299] Steering Committee for Human Rights, *Reflection Group on the reinforcement of the human rights protection mechanism*, CDDH-GDR(2001)10, 15 June 2001, 3-4.
[300] Steering Committee for Human Rights, *Reflection Group on the reinforcement of the human rights protection mechanism*, CDDH-GDR(2001)10, 15 June 2001, 6.
[301] Evaluation Group, *Report of the evaluation Group to the Committee of Ministers on the European Court of Human Rights*, EG Court(2001)1, 27 September 2001, 8.
[302] Evaluation Group, *Report of the evaluation Group to the Committee of Ministers on the European Court of Human Rights*, EG Court(2001)1, 27 September 2001, 36.
[303] Evaluation Group, *Report of the evaluation Group to the Committee of Ministers on the European Court of Human Rights*, EG Court(2001)1, 27 September 2001, 36.

could play a valuable role in this context by exerting more political pressure on the State party involved.[304]

In November 2001 then, the Committee of Ministers adopted the Declaration on "The protection of human rights in Europe: Guaranteeing the long-term effectiveness of the European Court of Human Rights".[305] During the same Ministerial Session, the Committee of Ministers adopted the abovementioned Report by the Evaluation Group and instructed the CDDH to (i) carry out a feasibility study of the most appropriate way to conduct the preliminary examination of applications, particularly by reinforcing the filtering of applications, and (ii) to examine and, if appropriate, submit proposals for amendments of the Convention, notably on the basis of the recommendations in the report of the Evaluation Group.[306]

In October 2002, the CDDH submitted its interim report in which it agreed to examine by June 2003 proposals to facilitate the handling of repetitive cases. In this context, it envisaged to examine proposals aiming at:

> *"(i) encouraging, in the framework of the execution of the Court's judgments, any State against which the Court has issued a judgment in a "pilot" case to make available to applicants having brought the same complaint, either a special remedy or full reparation; (ii) allowing the Court to decide on cases of lesser importance (on the admissibility and the merits) by following a simplified procedure, for instance, by increasing the powers of committees of three judges or by establishing a simplified procedure in the Chambers; (iii) improving the supervision by the Committee of Ministers of the execution of the Court judgments."*[307]

It is interesting here to see that the CDDH is no longer talking about clone cases, but is already alluding to a "pilot" case. It is not clear where this terminology originated from.

After the adoption of the Interim Report, the CDDH submitted its Final Report in April 2003 to the Committee of Ministers. Again, this report mentions pilot cases. However, it further develops the system in line with what it has grown into today. Firstly, the report defines a pilot judgment as a "*first case, […], a judgment which exposes a structural or general shortcoming in the law or the practice of the State, which may lead to a large number of complaints before the Court concerning the same State party*". This judgment then needs to include sufficient guidance to allow for the determination of subsequent cases concerning the same points of law.

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[304] Evaluation Group, *Report of the evaluation Group to the Committee of Ministers on the European Court of Human Rights*, EG Court(2001)1, 27 September 2001, 37.
[305] Committee of Ministers, *Declaration on the Protection of Human Rights in Europe – Guaranteeing the long-term effectiveness of the European Court of Human Rights*, CM(2001)164, 7-8 November 2001.
[306] Committee of Ministers, Minister's Deputies, *Decision Ad Hoc Terms of Reference Steering Committee for Human Rights*, CM/813/21112001, 21 November 2001; CDDH, *Final Activity Report of the CDDH: "Guaranteeing the Long-term effectiveness of the European Court of Human Rights"*, § 3-4, http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/Publications/reformcollectedtexts2004_e.pdf.
[307] Steering Committee for Human Rights, *Interim Report of the CDDH to be submitted to the Committee of Ministers "Guaranteeing the long-term effectiveness of the European Court of Human Rights",* CDDH(2002)016 Addendum, 14 October 2002, 2.

The report however stressed that allegations of serious human rights violations should not be considered as repetitive cases.[308] This remark proved important, because it was later used in some pilots not to freeze similar pending cases.

The report further again stresses the paramount importance of the principle of subsidiarity in the European Human Rights System. This would then result in the obligation on the State to ensure that applicants have an effective remedy following a pilot judgment. The report enumerates multiple advantages of having domestic remedies available: it would allow the registry to send cases back, even when the domestic remedy is then applied retroactively, and it would allow individuals to obtain redress at the national level. It is however interesting to see that the CDDH provides for the possibility that in some cases after a pilot judgment, it would be more appropriate to set up new remedies only for future applicants. The report does not indicate in which situations this would be the case. Allowing applicants who are already at the Court to seek redress in Strasbourg would however not be detrimental to the court's caseload if it would effectively provide for a faster solution for the applicant *and* the government were to accept a friendly settlement or accelerated procedure before the Court.[309]

Importantly, the report includes a proposal for the Committee of Ministers to invite the Court to identify in its judgments underlying systemic problems. The proposal includes a warning that it is not aimed to invite the court to indicate corrective measures since this prerogative belongs to the States themselves. Additionally, the proposal is also not aimed to interfere with the work of the Committee of Ministers in the execution of judgments. Its aim is to improve the work of the Committee of Ministers, making it more efficient through information found in the judgment itself.[310] The fact that the Committee of Ministers had not intended for the Court to start indicating specific general measures in the operative part was indeed confirmed by one respondent who had worked at the Committee before. It was merely their intention to receive somewhat more guidance from the Court as to what kind of case it was and what kind of measures the Court would deem appropriate in order to resolve the issue.[311]

In May 2003, the Committee of Ministers adopted its Declaration "Guaranteeing the long-term effectiveness of the European Court of Human Rights", in which it welcomed the CDDH's report. It also instructed the CDDH to continue its work on this and other points.[312] In September 2003, the European Court of Human Rights involved itself in the discussion by giving comments on the CDDH Report. The Court uttered the possibility of a pilot judgment

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[308] Steering Committee for Human Rights, *Guaranteeing long-term effectiveness of the control system of the European Convention on Human Rights. Addendum to the final report containing CDDH proposals (long version)*, CDDH(2003)006 Addendum Final, 9 April 2003, 9.
[309] Steering Committee for Human Rights, *Guaranteeing long-term effectiveness of the control system of the European Convention on Human Rights. Addendum to the final report containing CDDH proposals (long version)*, CDDH(2003)006 Addendum Final, 9 April 2003, 11.
[310] Steering Committee for Human Rights, *Guaranteeing long-term effectiveness of the control system of the European Convention on Human Rights. Addendum to the final report containing CDDH proposals (long version)*, CDDH(2003)006 Addendum Final, 9 April 2003, 35.
[311] Interview anonymous III.
[312] Committee of Ministers, *Declaration Guaranteeing the long-term effectiveness of the European Court of Human Rights*, Decl(15/05/2003), 15 May 2003.

procedure in the situation of systemic problems. It proposed that this would first of all empower the court to decline the examination of similar cases, while also triggering an accelerated procedure before the Committee of Ministers. This procedure would then entail the obligation for the State to both eliminate the issue for the future as well as provide a remedy – retroactively – for the victims. The Court would then adjourn the examination of similar pending cases while the State is setting up the remedy.[313]

In November 2003 then, the CDDH responded to this intervention by the Court. It suggested that the proposed system of the pilot judgment procedure was difficult to find under the existing Convention. An amendment would be necessary to introduce it. However, the CDDH was wary of introducing such an amendment because of the difficulties that might follow from obliging States to introduce retroactive measures. Instead, such a procedure could be created under the existing terms of the Convention.[314] Meanwhile, the Committee of Ministers adopted the abovementioned proposal of the CDDH and called on the Court in a resolution to identify in its judgments underlying systemic problems certainly when the case is likely to trigger numerous applications, "so as to assist States in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments".[315] In April 2004 then, the CDDH came out with its final report concerning the mandate it receiving in this context. It mentioned in this final report that it was planning to include a "considerably simplified procedure for dealing with repetitive cases" in its preparatory work for Protocol no; 14.[316]

c. The Committee of Ministers' subsequent Recommendation and Resolution

Subsequently, on 12 May 2004, the Committee of Ministers adopted two important instruments. Firstly, it came out with a Recommendation aimed at the States parties concerning the improvement of domestic remedies. In this, it focussed strongly on the importance of having an effective remedy in place in order to avoid repetitive cases at the Court.[317] During the discussion surrounding the Recommendation, it is important to note that the Committee of Ministers

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[313] European Court of Human Rights, *Position Paper of the European Court of Human Rights on proposals for reform of the European Convention on Human Rights and other measures as set out in the Report of the Steering Committee for Human Rights (CDDH)*, CDDH-GDR(2003)024, 12 September 2003, § 43.

[314] Steering Committee for Human Rights, *Guaranteeing the long-term effectiveness of the European Court of Human Rights – Implementation of the Declaration adopted by the Committee of Ministers at its 112th Session (14-15 May 2003)*, CDDH(2003)026 Addendum I Final, § 20-21; R. DEGENER, P. MAHONEY, "The Prospects for a test case procedure in the European Court of Human Rights" in D. PLAS, M. PUÉCHAVY, *Trente ans de droit européen des droits de l'homme. Etudes à la mémoire de Wolfgang Strasser*, Anthemis, 2008, 174-175; P. LEACH, H. HARDMAN, S. STEPHENSON, B.K. BLITZ, *Responding to Systemic Human Rights Violations. An Analysis of 'Pilot Judgments' of the European Court of Human Rights and their Impact at National Level*, Intersentia, 2010, p. 10; L. WILHABER, "Pilot Judgments in Cases of Structural or Systemic Problems on the National Level" in R. WOLFRUM, U. DEUTSCH, *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, International Workshop, Heidelberg, December 2007, 70.

[315] Committee of Ministers, *Resolution of the Committee of Ministers on judgments revealing an underlying systemic problem*, Res(2004)3, 12 May 2004.

[316] Steering Committee for Human Rights, *Guaranteeing the long-term effectiveness of the European Court of Human Rights – Implementation of the Declaration adopted at its 112th session (14-15 May 2003)*, CDDH(2004)004 Final, § 17.

[317] Committee of Ministers, *Recommendation on the improvement of domestic remedies*, REC(2004)6, 12 May 2004.

already referred to pilot judgment as such. The Court itself only used the term 'pilot judgment procedure' after the initial *Broniowski* judgment.[318] This already clarifies that there was some talk behind the scenes between the different bodies of the Council of Europe concerning the creation of a pilot judgment procedure. Interestingly, the Recommendation also talks about one of the consequences of the pilot case where the Court could invite the applicants in similar applications to have recourse to the new remedy set up nationally and even decide to declare their cases inadmissible.[319] However, it also states that this would not always be the case as it would inappropriate in certain circumstances to compel the applicants to bear the further burden of having to once again exhaust domestic remedies, which would not be in place until a change in the domestic legislation.[320]

The Committee further issued a Resolution on judgments revealing an underlying systemic problem. In this resolution, the Committee invited the Court to identify and diagnose the underlying structural problems in its judgments with a view to helping the State remedy them.[321] This was essentially qualified by the Court as a plea for help from the Committee of Ministers.[322] Immediately after, the Court reacted to the Committee of Ministers' invitation when it came out with its judgment in the first pilot judgment *Broniowski v. Poland* on 22 June 2004.[323] With the judgment, the Court showed that it did not want to wait for the proposed reform in Protocol 14, which could – as it rightly predicted – take years.[324]

d. The role of the Committee of Ministers: the idea behind the 2004 Resolution

There is considerable confusion as to where the concept and the operation of the pilot judgment precisely originated from. The abovementioned documents indeed make this history quite cloudy: did the idea come from the Committee of Ministers or from the Court? One source, former Judge Zagrebelsky of Italy writes that the Committee of Ministers actively looked for the help of the Court with its call for the pilot judgment procedure in the abovementioned Resolution. Since the Committee of Ministers is a political organ, it needs to decide on everything with a majority. And although it had already the common practice of indicating general measures in the supervision of the execution of judgments, in some cases it could not

[318] ECtHR, *Broniowski v. Poland* (friendly settlement), application no. 31443/96, 28 September 2005, §§ 34 and onwards.
[319] This seems to be an idea derived from the Pinto case law, which was already discussed above starting from page 62.
[320] Committee of Ministers, *Appendix to the Recommendation on the improvement of domestic remedies*, REC(2004)6, 12 May 2004, §§ 13-19.
[321] Committee of Ministers, *Resolution on judgments revealing an underlying systemic problem*, RES(2004)3, 12 May 2004.
[322] European Court of Human Rights, *Seminar Background Paper Implementation of the judgments of the European Court of Human Rights: a shared judicial responsibility?*¸ 2014, §9.
[323] ECtHR, *Broniowski v. Poland*, Application no. 31443/96, 22 June 2004.
[324] A. BUYSE, "Flying or landing? The pilot judgment procedure in the changing European human rights architecture" in O.M. ARNARDÓTTIR, A. BUYSE, *Shifting Centres of Gravity in Human Rights Protection. Rethinking relations between the ECHR, EU , and national legal orders*, Routledge, 2016, 103-104.

agree to those general measures. As a consequence, he contends that the Committee then asked the Court to lend a hand in this respect. [325]

This is the only source in the literature expressly mentioning this. It can however be supported by the text of the documents in question. The specific text of the Resolution also does not indicate that the Committee of Ministers asked the Court to list general measures in its judgments. It instead requested the Court to diagnose the specific systemic or structural issue at stake. These are indeed two completely different aspects of a pilot judgment procedure. In addition, in the abovementioned Recommendation, the Committee also provides a different description of what the procedure looks like to them and again, the stipulation of general measures by the Court is not included.

This turn of events was described during the interviews at the Court in Strasbourg. One respondent explained that the Committee of Ministers indeed asked the Court for help. The Court entertained cases rather chronologically, as a result of which it was lagging behind. In practice, this resulted in the Court requesting solutions from a State based on fact patterns taking place multiple years before. The Committee of Ministers needed more information in order to find a practical solution to these kinds of situations. It needed to know from the Court how many other cases were behind representing similar fact patterns, whether it was a structural problem. If not, the Committee reasoned that it was fighting a losing battle without this much-needed information. As a result, the Committee came out with its Resolution which in turn was perceived by the Court as an invitation to start with the pilot judgment procedure.[326] Several respondents at the Court hinted towards this. One respondent clarified that:

> *"At that time [meaning, the time when Protocol 14 was drafted], I must admit that the CDDH was not really open toward the idea that came from the Court concerning the introduction of a pilot judgment procedure as a working method which will be legislatively prescribed by Protocol 14. At that time, this idea was accepted with some kind of reserve. But then the Committee of Ministers was willing to support the idea of the Court and I can say that perhaps this triangle of different organs was somehow, in moments when one aspect was not probably well envisaged by CDDH, the other angle of this triangle, Commitee of Ministers, was here to balance and to accept the initiative of the Court."*[327]

Another respondent recounted that the idea for the pilot judgment procedure indeed originated at the Court. [328] Concerning the Committee of Ministers' Resolution inviting the Court to clarify its judgments, one respondent explained that this came about because of criticisms of the Court's judgments that were being voice by some commentators. One of those critics was Pierre-Henri Imbert, the then Director of Human Rights at the Council of Europe. This

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[325] V. ZAGREBELSKY, "Violations structurelles et jurisprudence de la Cour Européenne des Droits de l'Homme", *La Nouvelle Procédure devant la Cour Européenne des Droits de l'Homme après le Protocole N° 14* , Colloquium, Ferrara, April 2005, 152.
[326] Interview anonymous III.
[327] Interview dd 12.01.2017.
[328] Interview anonymous II.

respondent clarified that Imbert complained that he had to advise the Committee of Ministers what the judgment implied in the way of remedial execution measures and very often he was in a difficult position to do anything of the kind in the light of the judgment. It was often very difficult, to work out whether the violation found was to be analysed as a one-off, isolated incident or whether it was the product of a general problem in the country concerned; whether simply paying financial compensation to the particular applicant involved was enough or whether there were other victims of the same sort of violation in the wing; whether the Committee of Ministers had to require general remedial measures of the respondent State as proper execution of the judgment. He further did not want to be in a position where the Committee's secretariat drafted a meeting document stating its opinion that general measures were required only to be met by the respondent State protesting that none of this was in the Court's judgment and that it was prepared to pay the money awarded to the particular applicant by the Court as just satisfaction and that was it. He pointed to the very real difficulties that the Court's "opaque" judgments were causing at the execution stage. It would help the respondent State in knowing what it had to do, what measures, individual and general, it had to take in order to fulfil its treaty obligation of "abiding by" the judgment, it would help the Committee of Ministers in discharging its responsibility of supervising the execution of judgments. This would also avoid disputes between respondent States and the Committee of Ministers, if the Court could be clearer in identifying the source of violations and, in particular, systemic or structural problems in the legal system of the country."[329]

e. Conclusion: collaboration but ultimately the Court's initiative

This clarifies that all sides of the abovementioned triangle[330] agreed that the Court needed to identify the existence of systemic issues in its judgments, in order to facilitate more effective execution at the level of the Committee of Ministers. Here, the key would lie to helping States execute their duties under the Convention and would ultimately stop the constant stream of repetitive cases to Strasbourg.

The Court however took it a bit further by starting to put binding obligations on States in pilot judgments to take general measures. The Committee of Ministers seems to have been against this development, while the CDDH warned that the Court did not have the competence to do so. The Court however found a way to bring this competence within the borders of the Convention and hereby created the pilot judgment procedure as we know it today.

3. Zooming out: Protocol 14 and the high level conferences

The origin of the pilot judgment procedure must further be placed against the background of the creation of Protocol 14 to the ECHR. The start for the drafting process for this Protocol was also given at the Ministerial Conference in Rome of 2000 and the preparatory works were carried out by the same bodies as mentioned above (cfr. The Evalutation Group and the

[329] Interview anonymous II.
[330] Meaning the CDDH, the Committee of Ministers and the Court.

Reflection Group of the CDDH).[331] The Protocol itself was adopted in May 2004, but only entered into force in June 2010.[332]

a. Relevance of Protocol 14 to pilot judgments

From the explanatory report to Protocol 14, it is clear that the reason why there was a need for institutional change at that time was precisely the overload of the Court and the worry that the Convention would not function properly in the future.[333] It refers multiple times to the need to find an instrument for the Court to help resolve applications which stem from domestic structural problems. However, nothing in the Explanatory Report to the Protocol suggests that the Court will now also be able to give guidance to the States – let alone binding general measures – concerning the changing of their laws.[334] Indeed, the pilot judgment procedure was expressly kept out of the reform efforts of Protocol 14.[335]

Protocol 14 nevertheless introduced two new measures which are of interest in the context of the pilot judgment procedure.[336] First of all, the Protocol has included the capacity for the committees of three judges to rule in a fast-track on the merits in repetitive cases, provided that the underlying question is subject to established case law.[337] This is what has been called the WECL-procedure and will prove important in the context of repetitive cases, including cases revealing a systemic problem.[338] Furthermore, and of particular importance in the context of pilots, the Committee of Ministers is given the possibility to bring a State before the Court based on article 46 when the State refuses to comply with a final judgment by the Court. This has been termed an infringement procedure. The Committee would need a two-thirds majority of the representatives entitled to sit on it, in order to have the authority to bring a case.[339] This measure was expressly created to strengthen the Committee of Ministers' powers, since the

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[331] Council of Europe, *Explanatory Report to Protocol 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention*, Council of Europe Treaty Series – No. 194, 13 May 2004, §s. 20-22.

[332] Council of Europe, *Details of Treaty no. 194*, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/194.

[333] Council of Europe, *Explanatory Report to Protocol 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention*, Council of Europe Treaty Series – No. 194, 13 May 2004.

[334] L. WILHABER, "Pilot Judgments in Cases of Structural or Systemic Problems on the National Level" in R. WOLFRUM, U. DEUTSCH, *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, International Workshop, Heidelberg, December 2007, 70; M. SUSI, "The Definition of a 'Structural Problem' in the Case law of the European Court of Human Rights Since 2010", *German Yearbook of International Law*, 2012, 408.

[335] This was discussed in "The Committee of Ministers' subsequent Recommendation and Resolution" starting from page 71.

[336] It must be noted that these new measures were already in place with respect to the states parties who ratified Protocol 14bis, which will be discussed later hereunder starting from page 76. They became relevant to all member states of the Council of Europe with Protocol 14.

[337] Article 8 Protocol 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, Council of Europe Treaty Series – No. 194, 13 May 2004.

[338] D.J. HARRIS, M. O'BOYLE, E.P. BATES , C.M. BUCKLEY (eds.), *Law of the European Convention on Human Rights*, OUP, 2014, 111-112.

[339] Articles 10 and 16 Protocol 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, Council of Europe Treaty Series – No. 194, 13 May 2004.

rapid and full execution of the Court's judgments is vital when it comes to repetitive cases.[340] This would not result in a new finding of a substantial violation by the Court, nor would it lead to a financial punishment for the State involved. It is more of a 'naming and shaming' tactic, meant to exert political pressure onto the reluctant State in order to foster compliance.[341]

b. Delayed implementation of Protocol 14: interim solutions

In 2005, the Committee of Ministers had appointed a Group of Wise Persons to reflect on further means for the Court to reduce its backlog and limit the number of incoming petitions, going beyond the measures in Protocol 14 and which could be done while the Protocol was not yet in force. In their report, the Group of Wise Persons expressly endorsed the pilot judgment procedure – which was then recently created[342] - and suggested that it could be included in the Rules of Court or maybe even in the Convention itself. It further proposed a new judicial filtering mechanism and a simplified procedure to amend the Convention in order to avoid lengthy ratification processes of additional protocols.[343]

By 2006, all States except Russia had ratified Protocol No.14, barring it from entering into force.[344] As a result, the States parties came out with an agreement to allow certain provisions from Protocol 14 to already enter into force in relation to certain States who consent to this.[345] The Single Judge procedure and the WECL competence of the Committees of three judges were already installed with respect to the States adhering to Protocol 14bis.[346] This Protocol 14bis turned out to be a success, it already considerably reduced the backlog of the Court before Protocol 14 could enter into force.[347]

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[340] Council of Europe, *Explanatory Report to Protocol 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention*, Council of Europe Treaty Series – No. 194, 13 May 2004, § 98.

[341] Council of Europe, *Explanatory Report to Protocol 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention*, Council of Europe Treaty Series – No. 194, 13 May 2004, § 100.

[342] The first pilot of *Broniowski v. Poland* came out on 22 June 2004.

[343] Committee of Ministers, *Report of the Group of Wise Persons to the Committee of Ministers*, CM(2006)203, 15 November 2006; Y. HAECK, J. VANDE LANOTTE, "Desperatly Trying to Keep the Titanic Afloat: The Reform Proposals concerning the European Convention on Human Rights ater Protocol 14: the Report of the Group of Wise Persons… and Some Further Proposals", 1 *IAEHRJ*, 2008, 108.

[344] Council of Europe, *Chart of signatures and ratifications of Treaty 194*, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/194/signatures?p_auth=BaU4Fahj; M. E. VILLIGER, "The European Court of Human Rights and the Interlaken Declaration of 19 February 2010", in J. BRÖMER (ed.), *The Protection of Human Rights at the beginning of the 21st Century – Colloquium in Honour of Prof. Dr. Dr. Dr. h.c.mult. Georg Ress on the occasion of his 75th Birthday*, Nomos, 2012, 138.

[345] Agreement of Madrid of 12 May 2009 on the provisional application of certain provisions of Protocol 14 pending its entry into force, Madrid, 12 May 2009.

[346] Protocol No; 14bis to the Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe Treaty Series No. 204, 27 May 2009.

[347] M. E. VILLIGER, "The European Court of Human Rights and the Interlaken Declaration of 19 February 2010", in J. BRÖMER (ed.), *The Protection of Human Rights at the beginning of the 21st Century – Colloquium in Honour of Prof. Dr. Dr. Dr. h.c.mult. Georg Ress on the occasion of his 75th Birthday*, Nomos, 2012, 138-139; B. OHMS, "The Coming into force of Protocol 14 and the Short but Very Successful Life of Prrotocol No. 14bis to the European Convention on Human Rights" in W. BENEDEK, F. BENOÎT-ROHMER, W. KARL, M. NOWAK (eds.), *European Yearbook on Human Rights*, NWV, 2010, 217-218; C. BURBANO-HERRERA, "SOS European Court of Human Rights: Protocol 14bis Urgently Reforms the Institutional Framework While Awaiting the Entry into Force of Protocol 14", 3 *IAEHRJ*, 2010, 129.

c. A series of High-Level Conferences

Parallel with this development, the then President of the Court, Jean-Paul Costa, took the initiative to organize a high-level conference. The conference was designed for the States parties to discuss the difficult situation of the Court and was aimed at offering a solution to the stalemate around Protocol 14.[348]

The Conference was organized in Interlaken by Switzerland in October 2010 and focussed on a number of specific themes, among which the right to individual petition and repetitive applications.[349] Right before the start of the conference, Russia deposited its ratification of Protocol 14, which then could enter into force.[350] The fundamental importance of the right to individual petition was again affirmed as one of the key factors of the European Human Rights System. The Interlaken Declaration calls in this regard on the Committee of Ministers to think about additional measures to improve the Court's efficiency "without deterring well-founded" applications.[351] Additionally, during the conference, there was talk of adding some conditions to the exercise of the right to individual petition: (i) compulsory legal representation; (ii) the payment of court fees; and (iii) the use of one of the two official languages when filing an application. Although these conditions were included in an early draft of the Declaration, they were not included in the final version.[352] Concerning repetitive applications, the Declaration offers no new solutions than the already existing pilot judgment procedure. It however does call on States to facilitate friendly settlements and unilateral declarations concerning these cases and to cooperate closely with the Committee of Ministers in order to find a solution. Specifically directed towards the Court, the Declaration emphasizes the need to create clear and predictable standards for the application of the pilot procedure, including standards concerning the selection of cases, the procedure to be followed and the treatment of frozen cases.[353] In order to improve the Court's efficient dealing with the increasing number of incoming cases, the Declaration suggested the creation of a filtering division within the Court. It further hinted that this filtering division could also deal with repetitive cases.[354] This ultimately resulted in a very effective

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[348] M. E. VILLIGER, "The European Court of Human Rights and the Interlaken Declaration of 19 February 2010", in J. BRÖMER (ed.), *The Protection of Human Rights at the beginning of the 21st Century – Colloquium in Honour of Prof. Dr. Dr. Dr. h.c.mult. Georg Ress on the occasion of his 75th Birthday*, Nomos, 2012, 139.

[349] High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration, 19 February 2010.

[350] A. MOWBRAY, "The Interlaken Declaration – The Beginning of a New Era for the European Court of Human Rights?, 10 *Human Rights Law Review*, 2010, 525.

[351] High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration, Action Plan, article A, 19 February 2010.

[352] M. E. VILLIGER, "The European Court of Human Rights and the Interlaken Declaration of 19 February 2010", in J. BRÖMER (ed.), *The Protection of Human Rights at the beginning of the 21st Century – Colloquium in Honour of Prof. Dr. Dr. Dr. h.c.mult. Georg Ress on the occasion of his 75th Birthday*, Nomos, 2012, 143.

[353] High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration, Action Plan, article D.a), 19 February 2010; M. E. VILLIGER, "The European Court of Human Rights and the Interlaken Declaration of 19 February 2010", in J. BRÖMER (ed.), *The Protection of Human Rights at the beginning of the 21st Century – Colloquium in Honour of Prof. Dr. Dr. Dr. h.c.mult. Georg Ress on the occasion of his 75th Birthday*, Nomos, 2012, 146.

[354] [354] High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration, Action Plan, articles C and D, 19 February 2010.

working method for the Court, the WECL-criterion on which this thesis will elaborate on.[355] In general, the Interlaken process initiated a long-term discussion on the future of the Court. The Declaration itself merely sketched the possible avenues for solutions in the future – ideas which had already been circulating within the Council of Europe for years - and delegated tasks to different actors in this respect.[356]

The next High Level Conference took place in Izmir in April 2011 and included a Follow-up Plan to the Interlaken action plan. The Izmir Follow-up plan called on the Committee of Ministers to again look into the possibility of charging fees to applicants and other procedural possibilities so as to decrease the number of incoming petitions.[357] It further welcomed the new competences of the committees of three judges, including the competence to deal with repetitive cases, and the new Rule 61 dealing with pilot judgments. In the context of repetitive cases, it further invited the states to give preference to friendly settlements and unilateral declarations when resolving repetitive cases.[358] Interestingly, the Follow-up plan also instructed the Committee of Ministers to investigate the possibility of introducing the competence for the Court to deliver advisory opinions, a idea further worked out in Protocol 16 to the Convention which is yet to enter into force.[359]

Fairly quickly a new High Level Conference took place, this time in Brighton in April 2012. Again, there are a few interesting additions to the framework set out by the Interlaken process. Firstly, the Conference now also supported the idea uttered by the Court to reduce the time within which an application can be submitted to four months.[360] This will eventually be included in Protocol 15, which is yet to enter into force.[361] The declaration further raises the following idea: *"[The Conference], building on the pilot judgment procedure, invites the Committee of Ministers to consider the advisability and modalities of a procedure by which the Court could register and determine a small number of representative applications from a group of applications that allege the same violation against the same respondent State Party, such determination being applicable to the whole group.*"[362] Also very interestingly, the Brighton declaration suggested an ideal time-line for the processing of cases for the Court. It proposed that the Court should be able to decide whether to communicate a case or not within one year.

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[355] Conference on the long-term future of the European Court of Human Rights, Session I – History, reforms and remaining challenges, speech by Martin Kuijer, Oslo, 7 April 2014, 34. Further explanation concerning the WECL-procedure can be found from page 106 on.
[356] A. MOWBRAY, "The Interlaken Declaration – The Beginning of a New Era for the European Court of Human Rights?, 10 *Human Rights Law Review*, 2010, 527.
[357] High Level Conference on the Future of the European Court of Human Rights, Izmir Declaration, Follow-up Plan, Article A.2, 27 April 2011.
[358] High Level Conference on the Future of the European Court of Human Rights, Izmir Declaration, Follow-up Plan, Article E, 27 April 2011.
[359] High Level Conference on the Future of the European Court of Human Rights, Izmir Declaration, Follow-up Plan, Implementation Point 2.b., 27 April 2011.
[360] High Level Convention on the future of the European Court of Human Rights, Brighton Declaration, Point C. 15. A), 20 April 2012.
[361] Article 4 Protocol No. 15 Amending the Convention on the Protection of Human Rights and Fundamental Freedoms, Council of Europe Treaty Series No. 213, 24 June 2013.
[362] High Level Convention on the future of the European Court of Human Rights, Brighton Declaration, Point D. 20. D), 20 April 2012.

Thereafter, all communicated cases should be resolved, either through decision or judgment, within two years.[363] This has proved to be an important guideline for the Court, not in the least to start measuring its own backlog. Cases which the Court was not able to deal with within these parameters are now marked as falling within the 'Brighton Backlog'.[364] Finally, the Brighton Declaration called for a process which not only thinks about the problems that were faced by the Court at that time, but also looked further into the future. Indeed, the extended Interlaken process, encompassing also Izmir and Brighton, looked merely towards 2019. After Brighton, possible future challenged needed to be anticipated in order to develop a vision for the future of the European Human Rights System, aiming towards 2030.[365]

This process was officially started with the next High Level Conference on the long-term future of the Court, held in Oslo in April 2014. Unlike the previous high-level conferences, here was no clear outcome of the conference in a the form of a declaration . However, the conferences did prelude a new wave of ideas concerning the long-term future of the Court and possible reforms in that respect. A broad spectrum of issues was discussed between members of the Court, State representatives and academics which can be divided in three main focusses. Firstly, the backlog of the Court's caseload was on the forefront of the discussions. Secondly, the conference concerned itself with the political backlash against the Court and thirdly, the accession of the EU to the Convention.[366]

Subsequently, there was a High-level Conference in Brussels on the implementation of the Convention. Following the positive evolutions due to the reforms of Protocol 14, the Oslo conference had placed an emphasis on the issue of non-implementation as posing the greatest risk in the future.[367] In this sense, the Brussels Declaration states that "emphasis must now be placed on the current challenges, in particular the repetitive applications resulting from the non-execution of Court judgments, the time taken by the Court to consider and decide upon potentially well-founded cases, the growing number of judgments under supervision by the Committee of Ministers and the difficulties of States Parties in executing certain judgments due to the scale, nature or cost of the problems raised."[368]

It can be argued that from the Oslo Conference on the Court turned its focus more externally, focussing on the States parties and the Committee of Ministers. More specifically, when it comes to the Court's backlog it seems that the Court has done away with the biggest portion of easier cases due to reforms in its internal working methods. However, with the caseload still

[363] High Level Convention on the future of the European Court of Human Rights, Brighton Declaration, Point D. 20. h), 20 April 2012.
[364] European Court of Human Rights, *The Interlaken Process and the Court (2016 Report)*, 1 September 2016, § 6.
[365] High Level Convention on the future of the European Court of Human Rights, Brighton Declaration, Point G. 30., 20 April 2012; Conference on the long-term future of the European Court of Human Rights, Opening Ceremony, speech by Dean Spielmann, Oslo, 7 April 2014.
[366] Conference on the long-term future of the European Court of Human Rights, Closing the Conference – Summing Up, speech by Geir Ulfstein Oslo, 8 April 2014, 189.
[367] Conference on the long-term future of the European Court of Human Rights, Closing the Conference – Summing Up, speech by Geir Ulfstein Oslo, 8 April 2014, 189-190.
[368] High-level Conference on the "Implementation of the European Convention on Human Rights, our shared responsibility", Brussels Declaration, 25 March 2015.

high and now mostly encompassing meritorious cases that need an actual resolution, the Court calls the help of its partners within the Council of Europe.[369] The Action Plan attached to the Brussels Declaration is primarily directed towards the States parties and the Committee of Ministers. The former is encouraged to improve their procedure for execution of judgments. The latter is asked to gather information concerning the implementation of judgments and to question whether new measures are necessary in the future.[370]

4. Conclusion: the origins and ratione legis of the pilot judgment procedure

Although the pilot judgment procedure thus indeed seems to come out of thin air to the outside perspective, inside the Council of Europe and the Court there were developments taking place that ultimately culminated into the creation of the pilot judgment procedure.

On the micro-level, the Court was putting out case law in which it addressed structural problems, while in other cases it required specific individual measures from the State to execute its judgments. These two developments paved the way for the pilot judgment procedure which can be seen as bringing these two developments together: a finding of the existence of a systemic human rights issue, requiring specific measures from the State to address it in execution of the judgment.

On a broader level, the creation of the pilot judgment procedure is even more evident. There was an interplay between the Court, the Committee of Ministers and the CDDH who were all trying to address the large share of repetitive cases at the Court's docket. There was agreement that the Court needed to signal to the Committee of Ministers that there was an underlying systemic issue. The Court however also started to indicate specific general measures which it made binding on the State in pilot judgments.

On the macro-level, development towards and surrounding the creation of the pilot judgment procedure are less apparent. It is however clear that there was a wide-spread urgency across the Council of Europe to address systemic problems in certain member States. The major political actors tried to address this through the amendments of Protocol 14, thereby creating the WECL procedure which would be instrumental in the efficient functioning of the pilot judgment procedure.

It must be emphasized that these reforms were all carried out in the spirit of increasing the efficiency of the Court – and the European Human Rights System as a whole for that matter – and bringing the Court back to its intended role of international watchdog over the States. This more principled stance will be discussed in the next sub-chapter, as the arguments are linked with placing the pilot judgment procedure in its institutional context. What must be remembered however is that the interests of the victims of these large-scale issues was not of primary

[369] Conference on the long-term future of the European Court of Human Rights, Session I – History, reforms and remaining challenges, speech by Dean Spielmann, Oslo, 8 April 2014, 44.
[370] High-level Conference on the "Implementation of the European Convention on Human Rights, our shared responsibility", Brussels Declaration, 25 March 2015.

concern. They rarely come up in these discussions. This might explain why their rights are generally not given preference in the context of the pilot judgment procedure.

D. Placing the pilot judgment procedure in its institutional context

The proof of the pudding is in the eating or, as former Judge Françoise Tulkens has stated: "[a] judgment of the European Court of Human Rights is not an end in itself, but a promise of future change, the starting point of a process which should enable rights and freedoms to be made effective."[371] The problem with effectiveness is closely linked to the execution of judgments.[372]

The execution of judgments is dealt with under article 46 of the Convention. It encompasses a delicate balance between the three main actors tasked by it with safeguarding human rights: the States parties, the Court and the Committee of Ministers. Simply put, in this balance the Court is responsible for monitoring compliance with the Convention through legal assessments of individual cases, States must implement and safeguard the Convention and the Court's judgments and the Committee of Ministers is to overlook the execution by the States of the Court's judgments.[373] The Committee does this via a political mechanism whereby all states are represented and discuss the progress of execution during regular meetings in Strasbourg.[374] Although these tasks are not explicitly laid down in the Convention, the practice and procedure have developed as such over the years.[375] This division of powers has been said to be fundamental to the European Human Rights system.[376]

The Court's judgments are of a declaratory nature.[377] The nature of the obligation on the States to comply with the Court's judgments is generally an obligation of results. The State is given considerable discretion to choose the means to implement the Court's judgment, as long as these means achieve the intended result. This principle derives from the abovementioned balance of power within the Council of Europe System, shaped in the principle of subsidiarity on the one hand and the competences of the Committee of Ministers on the other. Consequently, in principle the Court will refuse to indicate specific measures which need to be taken by a State in order to execute its judgment.[378]

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[371] F. TULKENS, "Execution and effects of judgments of the European Court of Human Rights: the role of the judiciary" in Council of Europe, *Dialogue between Judges*, Strasbourg, 2006, 12.
[372] Committee of Ministers Evaluation Group, *Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights*, EG Court5(2001)1, 27 September 2001, 8.
[373] Articles 19 and 46 ECHR; European Court of Human Rights, *Seminar Background Paper Implementation of the judgments of the European Court of Human Rights: a shared judicial responsibility?*, 2014, § 3.
[374] Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, adopted on 10 May 2006 and as amended on 18 January 2017
[375] Committee of Ministers Evaluation Group, *Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights*, EG Court5(2001)1, 27 September 2001, 28.
[376] E. LAMBERT ABDELGAWAD, *The execution of judgments of the European Court of Human Rights*, Council of Europe Publishing, 2008, 6.
[377] C. DUBOIS, E. PENNINCKX, *La procédure devant la Cour européenne des Droits de l'Homme et le Comité des Ministres*, Wolters Kluwer, 2016, 393.
[378] E. LAMBERT ABDELGAWAD, *The execution of judgments of the European Court of Human Rights*, Council of Europe Publishing, 2008, 7.

The pilot judgment procedure has invited the criticism that the Court has gone beyond its judicial competences in the traditional sense.[379] It encroaches on this triangle of balanced powers in two ways. Firstly, by promulgating binding general measures on the States the Court is taking away the State's competence to decide how to implement its judgments, chipping away at the classic interpretation of the principle of subsidiarity. Secondly, these same general measures also reduce the Committee of Minister's competence to decide, in consultation with the affected States, which measures should be taken in order to tackle the issue domestically. Both of these issues will be explored here.

1. Relationship between the Court and the Contracting States: the principle of subsidiarity

The principle of subsidiarity is one of the fundaments of the Convention system. It means that the primary responsibility for ensuring respect for human rights is placed with the States. Only if they fail to do so, does it fall to the European Court of Human Rights to interfere.[380] Argued from a different perspective, Helfer contends that when the States as first-line defenders of human rights fail, then "*the core values underlying the Convention's 'special character as a treaty for the collective enforcement of human rights' are best served by giving the ECtHR a more assertive (but hopefully temporary) supervisory role*".[381]

As explained above in the previous sub-chapter[382], the pilot judgment procedure must be placed in the context of reforms of the Convention system. These reforms are not only aimed at the Court. To the contrary, they have taken a holistic approach: they are aimed at all actors involved in strengthening human rights in the Council of Europe, including the States parties. It has been claimed that the most pertinent way to address the overload of cases is through the States parties who need to take effective measures in domestic legislation and practice.[383] In his preparatory note to the Interlaken Conference, the then President of the Court stated that the subsidiarity principle shows that "*States must comply with the Court's case law and make sure that judgments of the Court are adequately executed, notably by adopting the appropriate general measures and by taking remedial action in respect of cases which could give rise to similar*

[379] D. T. BJÖRGVINSSON, "The "Pilot-Judgment" Procedure of the European Court of Human Rights" in G. ALFREDSSON, J. GRIMHEDEN, B. G. RAMCHARAN, A. DE ZAYAS, *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Möller*, Martinus Nijhoff Publishers, 2009, 540 ; M. FYRNYS, "Expanding Competences by Judicial Lawmaking: the Pilot Judgment Procedure of the European Court of Human Rights" in A. VON BOGDANDY, I. VENZKE, *International Judicial Lawmaking – On Public Authority and Democratic Legitimation in Global Governance*, Springer, 2012, 353.
[380] H. KELLER, A. FISCHER, D. KÜHNE, "Debating the Future of the European Court of Human Rights after the Interlaken Confeence: Two Innovative Proposals", *The European Journal of International Law*, 2011, 1031.
[381] L.R. HELFER, "Redesiging the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime", *The European Journal of International Law*, 2008, Vol. 1, 149.
[382] See "Creation of the pilot judgment procedure in the context of reforming the ECtHR" starting from page 61.
[383] Conference on the long-term future of the European Court of Human Rights, Closing the Conference – Summing up, Speech by Geir Ulfstein, Oslo, 8 April 2014, 190.

issues."[384] This idea is in full conformity with the notion of subsidiarity.[385] In recent years, the principle of subsidiarity has gained considerable attention as playing a central role in strengthening the Court. Judge Spano has even gone so far as to call the current era the "age of subsidiarity".[386] Furthermore, Protocol 15 which has yet to come into force specifically inserts the principle at the end of the Preamble to the Convention.[387] It has also been discussed in the Court's case law more and more frequently, taken centre stage after the start of the Interlaken-process.[388]

The principle is not yet explicitly laid down in the Statute of the Council of Europe, nor in the European Convention on Human Rights. Instead, it is implicitly imbedded in the combined reading of articles 1 and 19 of the Convention and has been interpreted as such by the Court.[389] As early as 1968, the Court has stated in the *Belgian language case* that:

> *"In attempting to find out in a given case, whether or not there has been an arbitrary distinction, the Court cannot disregard those legal and factual features which characterise the life of the society in the State which, as a Contracting Party, has to answer for the measure in dispute. In so doing it cannot assume the role of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention. The national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention. Review by the Court concerns only the conformity of these measures with the requirements of the Convention."*[390]

The principle of subsidiarity has played a considerable role in the Court's case law. The Court has always had to find a balance between its own competences and those of the national authorities. Overall, subsidiarity is reflected in the Court's contentieux on two levels. Firstly, substantive subsidiarity can be seen in the Court's refusal to take "fourth-instance applications" and the use of its margin of appreciation doctrine. These fourth-instance cases are rooted in a misapprehension on the part of the applicants on what the Court is. The Court cannot quash judgments of national courts, it is not a court of appeal. The Court thus has to practice self-

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[384] J.P. COSTA, *Memorandum of the President of the European Court of Human Rights to the States with a View to preparing the Interlaken Conference*, 3 July 2009, 4; H. KELLER, A. FISCHER, D. KÜHNE, "Debating the Future of the European Court of Human Rights after the Interlaken Confeence: Two Innovative Proposals", *The European Journal of International Law*, 2011, 1031.

[385] Conference on the long-term future of the European Court of Human Rights, Session I – History, reforms and remaining challenges, speech by Martin Kuijer, Oslo, 8 April 2014, 35.

[386] R. SPANO, "Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity", *Human Rights Law Review*, 2014, 487.

[387] Article 1 Protocol 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms, Council of Europe Treaty Series no. 213.

[388] A. MOWBRAY, "Subsidiarity and the European Convention on Human Rights", *Human Rights Law Review*, 2015,, 337-338.

[389] European Court of Human Rights, *Interlaken Follow-up – Principle of subsidiarity – Note by the jurisconsult*, §§4-6.

[390] ECtHR, *Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium (merits)*, application nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, 23 July 1968, Part B §10; emphasis added.

restraint: it cannot rule on the facts of the case, the interpretation or application of domestic law, the admissibility and assessment of evidence, the substantive fairness of the outcome of a civil dispute, or the guilt of an accused in criminal proceedings.[391] The margin of appreciation doctrine is used in the context of the proportionality test of articles 8, 9, 10 and 11 of the Convention. The *Belgian language case* exemplifies this doctrine very well. The margin of appreciation summarily means that the State is considered to be best placed to assess the specific circumstances of a case needed to make this balancing exercise of the proportionality test. The Court has in this context clearly stated that the margin of appreciation doctrine is a "tool to define relations between domestic authorities and the Court".[392]

Secondly, there is procedural subsidiarity, which is clearly reflected in the admissibility criteria enshrined in article 35 of the Convention. More specifically, the idea that the Court can only entertain a case after all domestic remedies have been exhausted is inherently the Council of Europe's recognition and safeguarding of the principle of subsidiarity.[393] Most importantly, this procedural subsidiarity is a consideration which is embedded in pilot cases as well. As a general rule, States can decide how to execute the Court's judgments. The Court has stated multiple times that its judgments have a declaratory character and that States are free to choose how to execute them, even in the context of pilot cases.[394] However, in some cases the Court will indicate specific general or individual measures based on a creative reading of article 46 ECHR. This is where the pilot judgment continuum is to be placed. Here, the Court has developed the practice of indicating general measures as a means to preventing future violations.[395]

In this context it is interesting to mention the *Neshkov* and *Varga* cases in which the Court gave a very detailed explanation of the possible avenues for Bulgaria and Hungary respectively, to improve its penitentiary system in line with the Convention.[396] However, the only binding general measure in the operative part of the judgment is the need to create an effective remedy for compensation. This may indicate that the Court is walking the line in a difficult balancing exercise between its own competences, those of the Committee of Ministers and those of the State involved. Indeed, in the *Neshkov* case, the Court indicates that it has refrained from giving specific indications as to general measures because that would fall outside of its judicial

[391] European Court of Human Rights, *Interlaken Follow-up – Principle of subsidiarity – Note by the jurisconsult*, §35.
[392] ECtHR, *A. and others v. United Kingdom*, application no. 3455/05, 19 February 2009, §184; European Court of Human Rights, *Interlaken Follow-up – Principle of subsidiarity – Note by the jurisconsult*, § 45.
[393] European Court of Human Rights, *Interlaken Follow-up – Principle of subsidiarity – Note by the jurisconsult*, §18.
[394] ECtHR, *Torreggiani and others v. Italy*, application nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 et 37818/10, 8 January 2013, § 91 ; A. DI MARCO, "L'état face aux arrêts pilotes de la Cour européenne des droits de l'homme ", *108 Revue Trimesterielle des droits de l'Homme*, 2016, 899.
[395] Conference on the long-term future of the European Court of Human Rights, Session III – Implementation of Judgments, Speech by Helen Keller, Oslo, 8 April 2014, 146; A. DI MARCO, "L'état face aux arrêts pilotes de la Cour européenne des droits de l'homme ", *108 Revue Trimesterielle des droits de l'Homme*, 2016, 897-898.
[396] ECtHR, *Neshkov and others v. Bulgaria*; application nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, 27 January 2015, §§272-291; ECtHR, *Varga and others v. Hungary*, application nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, 10 March 2015, §§ 101-110.

function.[397] One respondent clarified that indicating general measures in vague terms in the *Broniowski* case was in the same sense meant to given general guidance as to how to solve the issue.[398] The detailed list could however in this context thus be seen as guidance for the Committee of Ministers in monitoring the execution of the judgments.[399]

Most importantly in the context of pilot judgments is that the Court will in most cases[400] refrain from proclaiming very specific binding general measures. Instead, the Court will generally sketch some possibilities but will then emphasize the need for the State involved to set up an effective domestic remedy. As it stated in the *Neshkov* case, the Court refrained from spelling out specific general measures but it considered the need for the State to put in place an effective remedy as being of a different category. The Court considers that setting up this remedy "*will enable any person in the applicants' position to complain of a breach of article 3 of the Convention resulting from poor detention conditions and obtain adequate relief for any such breach at domestic level*".[401] Requiring a State to put in place an effective domestic remedy is a means for the Court to require the State to fulfil its duty under the principle of subsidiarity.[402] *Neshkov* is certainly not the only case in which the Court has indicated the States' need to put in place an effective remedy. To the contrary, in sixteen of the other full pilot cases the Court indicated that the State should set up effective domestic remedies, either as the sole binding general measure or in combination with others.[403] This emphasis of the Court on effective

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[397] ECtHR, *Neshkov and others v. Bulgaria*; application nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, 27 January 2015, § 279.

[398] Interview anonymous II.

[399] D. T. BJÖRGVINSSON, "The "Pilot-Judgment" Procedure of the European Court of Human Rights" in G. ALFREDSSON, J. GRIMHEDEN, B. G. RAMCHARAN, A. DE ZAYAS, *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Möller*, Martinus Nijhoff Publishers, 2009, 539; A. DI MARCO, "L'état face aux arrêts pilotes de la Cour européenne des droits de l'homme ", *108 Revue Trimesterielle des droits de l'Homme*, 2016, 900.

[400] The Court did for instance include specific general measures in the case of *Greens and M.T. v. UK*, by obliging the State to introduce a bill to lift the blanket ban on the right to vote for prisoners within six months of the pilot judgment.

[401] ECtHR, *Neshkov and others v. Bulgaria*; application nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, 27 January 2015, § 279.

[402] A. BUYSE, "Flying or landing? The pilot judgment procedure in the changing European human rights architecture" in O.M. ARNARDÓTTIR, A. BUYSE, *Shifting Centres of Gravity in Human Rights Protection. Rethinkingg relations between the ECHR, EU , and national legal orders*, Routledge, 2016, 101-102.

[403] ECtHR, *Ümmühan Kaplan v. Turkey*, application no. 24240/07, 20 March 2012, § 75; ECtHR, *Glykanzi v. Greece*, application no. 40150/09, 30 October 2012, § 81; ECtHR, *Michelioudakis c Grèce*, application no. 54447/10, 3 April 2012, § 76; ECtHR, *Torreggiani and others v. Italy*, application nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 et 37818/10, 8 January 2013, § 99; ECtHR, *Vassilios Athanasiou et autres v. Greece*, application no. 50973/08, 20 December 2010, § 57; ECtHR, *Ananyev and others v. Russia*, application nos. 42525/07 and 60800/08, 10 January 2012, § 234; ECtHR, *Burdov v. Russia (no. 2)*, application no. 33509/04, 15 January 2009, § 141; ECtHR, *Dimitrov and Hamanov v. Bulgaria*, application nos. 48059/06 and 2708/09, 10 May 2011, § 131; ECtHR, *Finger v. Bulgaria*, application no. 37346/05, 10 May 2011, § 133; ECtHR, *Gazsó v. Hungary*, application no. 48322/12, 16 July 2015,, § 39; ECtHR, *Gerasimov and others v. Russia*, application nos. 29920/05, 3553/06, 18876/10, 61186/10, 21176/11, 36112/11, 36426/11, 40841/11, 45381/11, 55929/11, 60822/11, 1 July 2014, § 226; ECtHR, *Olaru and others v. Moldova*, application nos. 476/07, 22539/05, 17911/08 and 13136/07, 28 July 2009, § 58; ECtHR, *Rumpf v. Germany*, application no. 46344/06, 2 September 2010, § 73; ECtHR, *Rutkowski and others v. Poland*, application nos. 72287/10, 13927/11 and 46187/11, 7 July 2015, § 221; ECtHR, *Suljagic v. Bosnia and Herzegovina*, application no. 27912/02, 3 November 2009, § 64; ECtHR, *Varga and others v. Hungary*, application nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and

domestic remedies in pilot cases is subsidiarity at its finest.[404] Furthermore, this has been termed by one of the respondents as "reasoning of self-preservation",[405] whereby the Court sends the work it has been given back to the States, within the parameters set up by the Convention.

The Court doesn't only detail possible solutions in full pilot cases. In *Orchowski v. Poland,* the Court indicated the following, although it did not make it a binding obligation in the judgment's operative part:

> *"The Court is aware of the fact that solving the systemic problem of overcrowding in Poland may necessitate the mobilisation of significant financial resources. However, it must be observed that lack of resources cannot in principle justify prison conditions which are so poor as to reach the threshold of treatment contrary to Article 3 of the Convention and that it is incumbent on the respondent Government to organise its penitentiary system in such a way that ensures respect for the dignity of detainees, regardless of financial or logistical difficulties. If the State is unable to ensure that prison conditions comply with the requirements of Article 3 of the Convention, it must abandon its strict penal policy in order to reduce the number of incarcerated persons or put in place a system of alternative means of punishment."*[406]

Following the *Broniowski* case and the new feature of the Court's judgment whereby general measures are made binding in the operative provisions, there was critique directed at the Court both from within the Court, as from academia and from States. These critics claimed that the Court is overstepping the boundaries of its competences with indicating these general measures to States. The critique is even stronger when the Court sets a time-limit for the State to implement the general measures or explicitly calls for legislative reforms, indicating that this may be intrusive or that time-limits are not realistic.[407] In this respect, the submissions of the Italian government in the *Sejdovic* case – a quasi-pilot case – is worth mentioning. The government did not oppose in principle the fact that the Court is giving fairly detailed indications on how to remedy the issue at hand. However, the Italian government did voice its concern that this new practice would nullify the principle that States are free to choose the means to execute judgments.[408]

64586/13, 10 March 2015, §§ 106-110; ECtHR, *Yuriy Nikolayevich Ivanov v. Ukraine*, application no. 40450/04, 15 October 2009, § 94.

[404] A.U. MARINKOVIĆ, K. KAMBER, "Fostering Domestication of Human Rights Through the Exhaustion of Domestic Remedis – A lesson Learned from the ECtHR Pilot and Leading Judgment Procedures", *Inter-American and European Human Rights Journal*, 2016, 337.

[405] Interview I dd 17.01.2017.

[406] ECtHR, *Orchowski v. Poland,* application no. 17885/04, 22 October 2009, § 153; emphasis added. A comparable idea, although less far-reaching, was uttered by the Court in ECtHR, *Mandić and Jović v. Slovenia*, application nos. 5774/10 and 5985/10, 20 October 2011, § 126; this is in essence the solution the Italian government chose after the *Torreggiani* case, a solution which was very controversial (Interview anonymous III).

[407] Conference on the long-term future of the European Court of Human Rights, Session III – Implementation of Judgments, Speech by Helen Keller, Oslo, 8 April 2014, 147; M. FYRNYS, "Expanding Competences by Judicial Lawmaking: the Pilot Judgment Procedure of the European Court of Human Rights" in A. VON BOGDANDY, I. VENZKE, *International Judicial Lawmaking – On Public Authority and Democratic Legitimation in Global Governance*, Springer, 2012, 351.

[408] ECtHR, *Sejdovic v. Italy*, application no. 56581/00, 1 March 2006, § 155.

Former Judge and Registrar Mahoney rebutted the critique that the Court cannot indicate general measures through a textual approach. He contended that there is nothing in the text of article 46 to bar the Court from specifying the consequences of a judgment finding a violation and even including that in the operative provisions. He stated: "*I do not understand why the Court's proceeding in such a manner in appropriate circumstances is in any way contrary to the Convention or to the rule of the binding effect of judgment*." He further continued that in the *Broniowski* case, the court merely fixed that the applicants in these cases should be able to enjoy their right to property, or else they should be given equivalent in lieu. Consequently, he concluded that the Polish State in the Broniowski case did receive considerable leeway to decide how to implement the judgment.[409] As a result, the Court did not overstep its boundaries.

Luzius Wildhaber, President of the Court at the time of the *Broniowski* judgment, touched upon the heart of the matter and represents the pragmatic approach to tackle the criticism concerning the Court's role in the context of subsidiarity. In a workshop concerning the improvement of domestic remedies, he emphasized that in matters which have been numerously judged upon by the Court, these cases should be repatriated to the domestic courts. There is no point in asking the Court to continuously confirm the same principles. They are clear and they should be thus dealt with domestically.[410] This is a view which was supported among many respondents at the Court.[411]

2. Relationship between the Court and the Committee of Ministers: article 46 and the institutional balance of powers.

a. The complementary nature of the relationship between the Committee of Ministers and the Court[412]

Seeing the history of the pilot judgment procedure, it can be stated that it was created as a tool to assist the Committee of Ministers and the Council of Europe States to better execute cases stemming from systemic and large-scale issues.[413] The main actors in the execution of judgments are the States and the Committee of Ministers. The former enjoy in principle a wide discretion to select the measures they will take in order to execute judgments rendered by the Court. However, States will have to communicate with the Committee of Ministers as well, as the Committee of Ministers is tasked with assessing whether the chosen measures will

[409] P. MAHONEY, "Discussion Following the Presentation by Luzius Wildhaber" in R. WOLFRUM, U. DEUTSCH, *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, International Workshop, Heidelberg, December 2007, 85.
[410] Directorate General of Human Rights, *Applying and supervising the ECHR – The improvement of domestic remedies with particular emphasis on cases of unreasonable length of proceedings – workshop held at the initiative of the Polish Chairmanship of the Council of Europe's Committee of Ministers*, Council of Europe, 2006, 10.
[411] Interview 11.01.2017; Interview III 13.01.2017; Interview anonymous II.
[412] The language concerning the complementary nature of the relationship between the Court and the Committee of Ministers was also used in European Court of Human Rights, *Seminar Background Paper Implementation of the judgments of the European Court of Human Rights*, 2014, § 9.
[413] E. LAMBERT ABDELGAWAD, *The execution of judgments of the European Court of Human Rights*, Council of Europe Publishing, 2008, 53; European Court of Human Rights, *Seminar Background Paper Implementation of the judgments of the European Court of Human Rights*, 2014, § 8-9.

effectively achieve the result required by the Court.[414] The Committee of Ministers is inherently a political body. It creates a forum for constructive dialogue and political review of execution process. The supervision of the execution of the Court's judgments proceeds in a cooperative manner, contrary to the inquisitorial nature of the procedure before the Court.[415] Originally thus, there was a strict division of competences between the Court and the Committee of Ministers concerning the execution of judgments, a competence reserved for the latter.[416]

This strict division of powers has worked with success during the first forty years of the Council of Europe. However, it has begun to show cracks with the expansion of the system and the political climate turning against it. The Court has reacted to this with a growing interference into the execution of its judgments by giving the States indications on how to remedy the violations found.[417] With respect to individual measures, it has justified this shift as follows:

> *"In some cases the Court considers the individual remedial measure to be self-evident to the point that any real choice is excluded. In these circumstances to leave such a measure to be identified through a lengthy process of dialogue between the Committee of Ministers and the respondent government runs counter to the principle of effectiveness which guides the Court in much of its work."*[418]

In case of the pilot judgment procedure, the Evaluation Group had already pinpointed the issue that the Court is usually aware of the large-scale nature of a certain issue at an earlier time than the Committee of Ministers. In seeing its docket being flooded, the Court is already aware that the first case represents only the tip of the iceberg.[419] The idea that the Court is de facto helping the Committee of Ministers with its diagnosis of the underlying problem and the indication of general measures was supported by several respondents in Strasbourg.[420]

Interestingly, these interferences by the Court do show to be effective as they put pressure on the State, pressure which the Committee of Ministers cannot always exert itself. Lambert-Abdelgawad has shown that when the Court gives these recommendations States tend to be more diligent and the Committee of Ministers will supervise the execution of these judgments more quickly and rigorously. Furthermore, the observations given by the Court when it examines an issue for the second time have proven to be more effective sometimes than the

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[414] Committee of Ministers Evaluation Group, *Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights*, EG Court5(2001)1, 27 September 2001, 28.
[415] M. FYRNYS, "Expanding Competences by Judicial Lawmaking: the Pilot Judgment Procedure of the European Court of Human Rights" in A. VON BOGDANDY, I. VENZKE, *International Judicial Lawmaking – On Public Authority and Democratic Legitimation in Global Governance*, Springer, 2012, 353.
[416] C. DUBOIS, E. PENNINCKX, *La procédure devant la Cour européenne des Droits de l'Homme et le Comité des Ministres*, Wolters Kluwer, 2016, 393-394 ; Interview anonymous II.
[417] C. DUBOIS, E. PENNINCKX, *La procédure devant la Cour européenne des Droits de l'Homme et le Comité des Ministres*, Wolters Kluwer, 2016, 394 ; Interview anonymous II.
[418] European Court of Human Rights, *Seminar Background Paper Implementation of the judgments of the European Court of Human Rights*, 2014, § 10.
[419] Committee of Ministers Evaluation Group, *Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights*, EG Court(2001)1, 27 September 2001, 36.
[420] Interview anonymous II ; Interview anonymous III ; Interview dd 12.01.2017.

Committee of Minister's interim resolutions. She further shows that pilot judgments have overall been satisfactorily executed,[421] with some exceptions.[422]

However, the delicate institutional balance between the Court and the Committee of Ministers has also been a point of discussion concerning the pilot judgment procedure.[423] Fairly early on, former Judge Björgvinsson expressed his doubts concerning the question whether the pilot judgment procedure really makes the work of the Committee of Ministers easier. Looking at the early pilot cases, he states that the Court is not being very clear on which specific measures it expects. This in turn creates problems for the work of the Committee of Ministers and blurs the line between the roles of both bodies.[424] Clearly, the cooperative political nature of the execution process is duly complicated by the 'judicialization' of it imposed by the Court through these general measures.[425] In the quasi-pilot case of *Sejdovic v. Italy*, the Government assessed the division of powers between the Court and the Committee of Ministers, criticizing the competences that the Court is claiming for itself in this respect. The Italian State contended that the only article giving some kind of power to the Court to "sentence" a State was article 41, no such power is to be found in article 46. Additionally, the new measures introduced by Protocol 14 for the Committee of Ministers – the possibility to request interpretations of judgments to the Court and the abovementioned infringement procedures – were claimed to clearly confirm this traditional division of powers. Furthermore, the respondent State argued that the Committee of Ministers with its Resolution aimed at inviting the Court to diagnose systemic issues, had not intended for the Court to also fix the solutions aimed at remedying these issues. This last competence must have remained with the Committee of Ministers, the Government opined.[426]

A comparable argument was also made against the application of the pilot judgment procedure in the case of *Yuriy Nikolayevich Ivanov v.Ukraine*, where the Government claimed that the use of the procedure would mean that the Court was performing a supervisory task, which belongs to the competences of the Committee of Ministers, as the Committee had already rendered a resolution containing the measures required from Ukraine.[427] The Court replied by clarifying that it is indeed the competence of the Committee of Ministers to supervise the implementation

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[421] E. LAMBERT ABDELGAWAD, "L'exécution des arrêts de la Cour européenne des droits de l'homme par le Comité des ministres (2013) : bilan et perspectives d'avenir", *Revue Trimesterielle des droits de l'homme*, 2014, 599-602 ; C. Dubois, E. Penninckx, *La procédure devant la Cour européenne des Droits de l'Homme et le Comité des Ministres*, Wolters Kluwer, 2016, 395.

[422] Such as the cases of *Greens and M.T. v. United Kingdom* and the famous *Yuriy Nikolaeyevic Ivanov v. Ukraine* case.

[423] L.R. HELFER, "Redesiging the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime", *The European Journal of International Law*, 2008, Vol. 1, 149.

[424] D. T. BJÖRGVINSSON, "The "Pilot-Judgment" Procedure of the European Court of Human Rights" in G. ALFREDSSON, J. GRIMHEDEN, B. G. RAMCHARAN, A. DE ZAYAS, *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Möller*, Martinus Nijhoff Publishers, 2009, 539; a comparable argument can also be found with Judge Zagrebelsky in ECtHR, *Lukenda v. Slovenia*, application no. 23032/02, 6 October 2005, Partly Dissenting Opinion of Judge Zagrebelsky.

[425] M. FYRNYS, "Expanding Competences by Judicial Lawmaking: the Pilot Judgment Procedure of the European Court of Human Rights" in A. VON BOGDANDY, I. VENZKE, *International Judicial Lawmaking – On Public Authority and Democratic Legitimation in Global Governance*, Springer, 2012, 353.

[426] ECtHR, *Sejdovic v. Italy*, application no. 56581/00, 1 March 2006, §§ 115-118.

[427] ECtHR, *Yuriy Nikolayevich Ivanov v. Ukraine*, application no. 40450/04, 15 October 2009, § 77.

of measures aimed at satisfying the States' obligations under article 46 of the Convention. The Court on the other hand is tasked to "ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto" based on Article 19 of the Convention. It emphasized that this task is not necessarily best achieved by repeating the same finding in large series of cases. Seeing the recurrent problems in this respect, it is within the competence of the Court to apply the procedure in order to "induce the respondent State to resolve large numbers of individual cases arising from the same structural problem at domestic level".[428] Further on in the case, the Court explains that multiple and complex measures are required from the State and as a result, the Committee of Ministers might be better placed to develop the specific general measures required. However, the Committee had already done so and the Ukraine government still had not started to remedy the underlying issue. As a result, the Court concluded that Ukraine had demonstrated "an almost complete reluctance" to solve the issue.[429] It thus seems that the Court is explaining in this specific context that it does have the competence to interfere, as the State is reluctant to abide by the general measures designed by the Committee of Ministers beforehand. The Committee of Ministers and the Court are working in close tandem, showing that they will follow-up on the issue until it is solved.

Apart from the indication of general measures, there are a number of other elements of the pilot judgment procedure which can be said to shift the institutional balance between the Court and the Committee of Ministers. It has become standard practice for the Court to indicate time-frames within which general measures must be executed. This signifies a further straying into the competences of the Committee of Ministers.[430] In several full pilot cases, the Court has indicated time-limits for the State to execute general measures.[431] For instance, in the case of

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[428] ECtHR, *Yuriy Nikolayevich Ivanov v. Ukraine*, application no. 40450/04, 15 October 2009, § 82.
[429] ECtHR, *Yuriy Nikolayevich Ivanov v. Ukraine*, application no. 40450/04, 15 October 2009, §§ 90-91.
[430] European Court of Human Rights, *Seminar Background Paper Implementation of the judgments of the European Court of Human Rights*, 2014, § 9.
[431] ECtHR, *Burdov v. Russia (no. 2)*, application no. 33509/04, 15 January 2009, Point 6 operative part; ECtHR, *Olaru and others v. Moldova*, application nos. 476/07, 22539/05, 17911/08 and 13136/07, 28 July 2009, Point 4 operative part; ECtHR, *Yuriy Nikolayevich Ivanov v. Ukraine*, application no. 40450/04, 15 October 2009, Point 5 operative part; ECtHR, *Suljagic v. Bosnia and Herzegovina*, application no. 27912/02, 3 November 2009, Point 4 operative part; ECtHR, *Rumpf v. Germany*, application no. 46344/06, 2 September 2010, Point 5 operative part; ECtHR, *Maria Athanasiu and others v. Romania*, application nos. 30767/05 and 33800/06, 12 October 2010, Point 6 operative part; ECtHR, *Vassilios Athanasiou et autres v. Greece*, application no. 50973/08, 20 December 2010, Point 5 operative part; ECtHR, *Finger v. Bulgaria*, application no. 37346/05, 10 May 2011, Point 5 operative part; ECtHR, *Dimitrov and Hamanov v. Bulgaria*, application nos. 48059/06 and 2708/09, 10 May 2011, Point 6 operative part; ECtHR, *Ümmühan Kaplan v. Turkey*, application no. 24240/07, 20 March 2012, Point 5 operative part; ECtHR, *Michelioudakis c Grèce*, application no. 54447/10, 3 April 2012 , Point 5 operative part; ECtHR, *Kurić and others v. Slovenia*, application no. 26828/06, 26 June 2012, Point 9 operative part; ECtHR, *Manushaqe Puto and others v. Albania*, application nos. 604/07, 43628/07, 46684/07 and 34770/09, 31 July 2012, Point 6 operative point; ECtHR, *Glykanzi v. Greece*, application no. 40150/09, 30 October 2012, Point 5 operative part; ECtHR, *Torreggiani and others v. Italy*, application nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 et 37818/10, 8 January 2013, Point 4 operative part; ECtHR, *M.C. and others v. Italy*, application no. 5376/11, 3 September 2013, Point 11 operative part; ECtHR, *Gerasimov and others v. Russia*, application nos. 29920/05, 3553/06, 18876/10, 61186/10, 21176/11, 36112/11, 36426/11, 40841/11, 45381/11, 55929/11, 60822/11, 1 July 2014, Point 12 operative part; ECtHR, *Alisic and others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia*, application no. 60642/08, 16 July 2014, Points 10-11 operative part; ECtHR, *Neshkov and others v. Bulgaria*; application nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, 27 January 2015, Point 7 a) operative part; ECtHR, *Gazsó v. Hungary*,

Xenides-Arrestis[432], the Court foresaw a time-frame of three months for the Turkish State to create a remedial measure, and another three months to compensate the applicants in these cases through this remedial measure.[433] However, in three other full pilots, the Court has taken a more cautious approach. In the cases of *Varga* and *Ananyev*, the Court has required the State to produce to the Committee of Ministers within a set time-limit a fixed time-frame to make the necessary general measures.[434] In the case of *Greens and M.T.*, the Court inserted in the operative part the obligation for the United Kingdom to first, have a draft bill ready within a certain time-period but then only to enact this new legislation within a time-frame fixed by the Committee of Ministers.[435] This balancing of functions between the Court and the Committee of Ministers shows the increasingly complementary nature of the division of powers between them. [436] Some respondents even go as far as to admit there is an overlap of functions now between the Court and the Committee of Ministers.[437]

Another practice which signifies the tension created by the pilot judgment procedure is the Court's assessment of the general measures after they have been put in place domestically. The Court will let another case come through for a decision on the admissibility in order to make sure that the general measures put in place after the principal pilot case are adequate to solve the underlying systemic issue. In the *Broniowski* friendly settlement judgment, the Court decided the following:

> "*While, by virtue of Article 46 of the Convention, it is for the Committee of Ministers to evaluate these general measures and their implementation as far as the supervision of the execution of the Court's principal judgment is concerned (see also Rule 43 § 3 of the Rules of Court), the Court, in exercising its own competence to decide whether to strike the case out of its list under Articles 37 § 1 (b) and 39 following a friendly settlement between the parties, cannot but rely on the respondent's Government's actual and promised remedial action as a positive factor going to the issue of 'respect for human rights as defined in the Convention and the Protocols thereto'*"[438]

Commentators have however argued that the Court only makes a superficial assessment of the national reforms being undertaken due to the pilot case. They claim the Court affords great leniency towards the States in setting up their remedies, approving them based on mere

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application no. 48322/12, 16 July 2015, Point 5 operative part; ECtHR, *W.D. v. Belgium*, application no. 73548/13, 6 September 2016, Point 6 operative part

[432] *Xenides-Arrestis* is *a* case which is internally considered as an early pilot or pilot-like case but is not specifically named as such in the judgment, it is therefore not included in this thesis' typology of full pilot cases; Interview II dd 18.01.2017.

[433] ECtHR, *Xenides-Arestis v. Turkey*, application no. 46347/99, 22 December 2005, Point 5 operative part

[434] ECtHR, *Ananyev and others v. Russia*, application nos. 42525/07 and 60800/08, 10 January 2012, Point 7 operative part; ECtHR, *Varga and others v. Hungary*, application nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, 10 March 2015, Point 9 operative part

[435] ECtHR, *Greens and M.T. v. UK*, application nos. 60041/08 and 60054/08, 23 November 2010, Point 6 operative parts.

[436] European Court of Human Rights, *Seminar Background Paper Implementation of the judgments of the European Court of Human Rights: a shared judicial responsibility?*, 2014, § 9.

[437] Interview II dd 20.01.2017; Interview anonymous II.

[438] ECtHR, *Broniowski v. Poland* (friendly settlement), application no. 31443/96, 28 September 2005, § 42.

promises or when there is no relevant practice yet to show how the remedy works.[439] Detailed examination of the new domestic systemic would then still fall to the Committee of Ministers.[440] Furthermore, the Court usually reserves itself the right to re-open a case when the circumstances justify this, meaning when the State has indeed not offered a real solution.[441] The *Broniowski* case for instance ended with the Court's *Wolkenberg* decision of 4 December 2007.[442] A group of Bug river applicants, whose cases had been adjourned, had submitted a claim before the Court based on the legislation which had been enacted due to the *Broniowski* judgment. Specifically, they complained that their right to property had been infringed because this Act of 2005 only provided for a compensation of 20% of the original value of their claim. They consequently complained that they had lost 80% of their lawfully accrued right due to this post-Broniowski legislation.[443] The Court made it clear that by virtue of article 46, it is for the Committee of Ministers to assess the general measures taken by the involved State and to supervise their execution in the light of the Court's judgment. The Court on the other hand needs to exercise its own power in the light of article 37 ECHR[444] in order to decide whether it can strike out the cases following the resolution of the overarching situation. To this end, the Court only has to assess whether the new legislation provided the applicants with relief at the domestic level.[445] More specifically, the Court emphasized that "*the Court's role after the delivery of the pilot judgment and after the State has implemented the general measures in conformity with the Convention cannot be converted into providing individualised financial relief in repetitive cases arising from the same systemic situation*."[446] This has been termed by one of the respondents in Strasbourg as quite cautious and circumscribed language by the Court, to make sure that it would not be seen as a ruling by the Court on the conformity of the measures

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[439] L. GARLICKI, "Broniowski and After: On the Dual Nature of ''Pilot Judgments''" in L. CAFLISH, J. CALLEWAERT, R. LIDDELL, P. MAHONEY AND M. VILLIGER (eds), *Human Rights – Strasbourg Views. Liber Amicorum Luzius Wildhaber*, N.P. Engel, 2007, 182; J.GERARDS, 'The Pilot Judgment Procedure before the European Court of Human Rights as an Instrument for Dialogue' in M. CLAES, M. DE VISSER, P. POPELIER AND C. VAN DE HEYNING (eds), *Constitutional Conversations in Europe*, Intersentia, 2012, 393; L. GLAS, 'The Functioning of the Pilot-Judgment Procedure of the European Court of Human Rights in Practice' NETHERLANDS QUARTERLY OF HUMAN RIGHTS 1, 2016, 64; W. SADURSKI, "Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments" 9 HRLR, 2009, 423.

[440] A. BUYSE, " The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges", *Nomiko Vima (Greek Law Journal): European Court of Human Rights - 50 Years*, 2010, 81.

[441] J.GERARDS, 'The Pilot Judgment Procedure before the European Court of Human Rights as an Instrument for Dialogue' in M. CLAES, M. DE VISSER, P. POPELIER AND C. VAN DE HEYNING (eds), *Constitutional Conversations in Europe*, Intersentia, 2012, 393-4.

[442] ECtHR decision, *Andrzej Wolkenberg and others v. Poland*, application no. 50003/99, 4 December 2007.

[443] ECtHR decision, *Andrzej Wolkenberg and others v. Poland*, application no. 50003/99, 4 December 2007, § 26.

[444] Article 37 of the Convention provides under which circumstances the Court can strike cases out of its list of cases. The Court can do this when 1) the applicant does not intend to pursue his application or; 2) the matter has been resolved or; 3) for any other reason established by the Court, it is no longer justified to continue the examination of the application. In the context of the pilot judgment procedure, the Court argues that it can strike out cases based on the fact that the matter has been resolved when the state has put the requested general measures in place. If so, the Court considers that it has fulfilled its role and that it can strike subsequent cases out of its docket.

[445] ECtHR decision, *Andrzej Wolkenberg and others v. Poland*, application no. 50003/99, 4 December 2007, § 77.

[446] ECtHR decision, *Andrzej Wolkenberg and others v. Poland*, application no. 50003/99, 4 December 2007, § 76.

taken by the State with the Broniowski judgment.[447] The latter would have certainly been the competence of the Committee of Ministers.

Furthermore, in the context of this follow-up procedure, the Court must make sure that the measures put in place by the State after the pilot case are not only beneficial to the applicant in that original case. These general measures must be aimed at resolving the general underlying issue in the domestic legal order as identified in the principal pilot judgment.[448] This again exemplifies the overlap created by the pilot judgment procedure perfectly. As one respondent explains, the Court's logic in general is individual. It assesses a situation on a case-by-case basis. The Committee of Ministers on the other hand is more problem-oriented and assesses situations more general. The pilot judgment procedure signifies the overlap between these two viewpoints and, according to this respondent, this creates its added value.[449]

b. The procedure before the Committee of Ministers with respect to pilot judgments.

In general, proceedings at the Committee of Ministers start with the Court's transmission of the case. The Committee will then automatically inscribe it on the agenda of the next human rights meeting. Cases involving systemic issues will be treated with priority. It will then also invite the involved State to provide it with information concerning the measures it has taken or is planning to take. In examining the execution of the case, the Committee will firstly focus on the question whether the State has already paid just satisfaction to the applicant. Subsequently and taking into account the discretion of the State to choose the kind of remedial measures, the Committee will assess the individual and general measures that have been adopted. The Committee also employs what it calls 'control intervals'. If the State hasn't provided the Committee with any information yet, the case will continue to be put on the agenda for the human rights meetings. If the State has informed the Committee that it has not been able to take the general measures necessary to implement the judgment, the case can be placed on the agenda of another human rights meeting no more than six months later. The case is completely closed after the Committee of Ministers delivers a Final Resolution in which it finds that the State has taken all remedial measures to abide by the judgment.[450]

With respect to pilot judgments, the Committee of Ministers has introduced after Interlaken a new twin track supervision system, in which pilot judgments will be treated by the Committee according to a priority scheme labelled the enhanced supervision procedure.[451] The procedure entails that the execution is more closely monitored. They are continuously put on the agenda of the Human Rights meetings as long as they are not executed and are debated there.[452] This

[447] Interview anonymous II.
[448] ECtHR decision, *Załuska and Rogalska v. Poland*, application nos. 53491/10 and 72286/10, 20 June 2017, § 36-37.
[449] Interview anonymous III.
[450] Rules 2, 3, 4, 6, 7 and 17 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, adopted on 10 May 2006 and as amended on 18 January 2017.
[451] Rule 4 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, adopted on 10 May 2006 and as amended on 18 January 2017; C. DUBOIS, E. PENNINCKX, *La procédure devant la Cour européenne des Droits de l'Homme et le Comité des Ministres*, Wolters Kluwer, 2016, 414.
[452] Point 19, Committee of Ministers Procedures and Working methods, 17 October 2017.

enhanced supervision procedure not only applies with respect to pilots. The Committee of Ministers will also turn to this procedure in case of judgments requiring urgent individual measures, interstate cases and other cases disclosing major structural and/or complex problems.[453] The standard procedure is the default procedure. Therefore, only a minority of cases is treated under the enhanced procedure. Of the total of 1352 new cases brought before the Committee in 2016, 668 were treated under the standard procedure, 295 were supervised under the enhanced procedure and 389 were awaiting classification.[454] The enhanced procedure imposes on the Committee the obligation to follow the execution of these cases more closely and will result in a more active interaction with the involved States. This may result in the Committee of Ministers assisting the States in drafting or implementing their action plans, in providing them with expert advice concerning the measures that could be taken, or in cooperation programs for cases raising complex problems.[455]

One of the respondents however signalled a current problem with the categorization of cases leading to this enhanced procedure:

> *"There is a kind of relatively newly emerging category of article 46[…]. When you look at pilot judgments, vis à vis the rules of procedure before the Committee of Ministers, you would see that they have enhanced procedure for pilot judgments but not for the rest. Well, they call it "systemic violations" and so on but, if you have this kind of unclear article 46 thing, then where should it go? to enhanced procedure? to normal procedure? So it may pose problems from the point of execution of judgments, what kind of procedure it requires."*[456]

The continuum of pilot and pilot-like cases above[457] shows indeed that the Committee of Ministers does not necessarily supervise all cases which involve a systemic issue by way of the enhanced procedure.

Furthermore, as this dissertation is also looking at the pilot procedure from the perspective of the applicants, it is important to mention that the Committee receives information from all actors involved in the proceedings before the Court. However, the applicants are only allowed to submit information concerning the payment of the just satisfaction or the individual measures. Comments concerning general measures will need to come from States, non-governmental organizations and national institutions for the promotion and protection of human rights (NHRI's).[458] In general, the phase of the execution is outside of the control of the applicant. The victims of these violations don't play a part in this arrangement, they are absent

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[453] Point 19, Committee of Ministers Procedures and Working methods, 17 October 2017.
[454] Committee of Ministers, *Supervision of the execution of judgments of the European Court of Human Rights* 2016, March 2017, 49.
[455] Committee of Ministers, *Supervision of the execution of judgments and decisions of the European Court of Human Rights 2016*, March 2017, 23; C. DUBOIS, E. PENNINCKX, *La procédure devant la Cour européenne des Droits de l'Homme et le Comité des Ministres*, Wolters Kluwer, 2016, 422.
[456] Interview I dd 16.01.2017.
[457] the Continuum of pilot and pilot-like cases can be found from page 30.
[458] Rule 9 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, adopted on 10 May 2006 and as amended on 18 January 2017.

from the Committee of Ministers.[459] Applicants would thus need to liaise with such organizations or institutions were they to comment on the general measures instituted by States following a judgment, as these actors are the only ones with access to the Committee of Ministers. Since June 2016 however, the Committee of Ministers has increased the transparency of its procedures, making sure that the cases which will be under supervision on the next human rights meeting are already on the agenda by the end of the previous one. This is meant to give the interested parties – including NGO's and NHRI's – the chance to submit their comments. This has indeed caused an increase of such submissions.[460] Information-sharing in general has increased, in order to put interested parties in the position to follow the execution of cases. The recent creation of the database HUDOC-EXEC is an example of this democratization of the Committee of Minister's work, aimed at increasing transparency and external involvement.[461]

As to general measures, it must be noted that the Committee of Ministers has had a long tradition of focussing on these kinds of measures with respect to the execution of cases. Originally, the Committee of Ministers was the Council of Europe body with the capacity to decide which general measures were necessary, sufficient and adequate.[462] Furthermore, general measures are not only the prerogative of pilot or pilot-like cases.[463] In assessing these general measures, the Committee of Ministers will ask proof from the State that it has adopted them. It can also ask the State to take further measures if the ones in place do not suffice. It is important to know that this supervision will continue after a friendly settlement was reached and the case was struck out of the list by the Court, contrary to when a case was struck out following a unilateral declaration.[464] In the context of this evaluation of general measures, the Committee of Ministers will have due regard for the effectiveness of domestic remedies, certainly in the context of pilot judgments. With this scrutiny, the Committee wants to encourage States to adopt provisional measures so as to avoid repeat violations in the waiting period towards reforms.[465]

If a State objects or delays taking certain measures in execution of the Court's judgments, the Committee of Ministers has some coercion methods available. First, the Committee can adopt Interim Resolutions in order to provide information about the execution process, to express concern or to make suggestions to the State involved.[466] Furthermore, since Protocol 14, the

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[459] E. LAMBERT ABDELGAWAD, *The execution of judgments of the European Court of Human Rights*, Council of Europe Publishing, 2008, 32.
[460] Committee of Ministers, *Supervision of the execution of judgments and decisions of the European Court of Human Rights 2016*, March 2017, 10.
[461] Committee of Ministers, *Supervision of the execution of judgments and decisions of the European Court of Human Rights 2016*, March 2017, 11.
[462] ECtHR, *Sejdovic v. Italy*, application no. 56581/00, 1 March 2006, § 116.
[463] ECtHR, *Hutten-Czapska v. Poland*, application no. 35014/97, 19 June 2006, Partly Dissenting Opinion Judge Zagrebelsky; E. LAMBERT ABDELGAWAD, *The execution of judgments of the European Court of Human Rights*, Council of Europe Publishing, 2008, 48.
[464] E. LAMBERT ABDELGAWAD, *The execution of judgments of the European Court of Human Rights*, Council of Europe Publishing, 2008, 37.
[465] C. DUBOIS, E. PENNINCKX, *La procédure devant la Cour européenne des Droits de l'Homme et le Comité des Ministres*, Wolters Kluwer, 2016, 406-407.
[466] Rule 16 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, adopted on 10 May 2006 and as amended on 18 January 2017.

Committee can decide to bring a reluctant State back before the Court to assess whether that State has failed to fulfil its obligation under article 46 §1 ECHR. [467] It is important to note that the Court, in the formation of the Grand Chamber, will not be asked to find a violation of the same primary issue again. It will instead only have to deal with the question whether the State has failed to execute its previous judgment.[468] These infringement proceedings will only be brought in exceptional circumstances. They required a two-thirds majority vote of the members allowed to sit on the Committee.[469] In December 2017, the Committee of Ministers announced that it would start such proceedings for the first time against Azerbaijan.[470]

3. The Burmych judgment: giving new meaning to the institutional balance within the Council of Europe

The recent judgment of the Court in *Burmych and others v. Ukraine* has shed new light on how the Court places itself in the institutional context of the Council of Europe. The case followed the earlier pilot case of *Yuriy Nikolayevich Ivanov v. Ukraine* which was not executed, leading to a steady increase of similar cases and prompting the Court to re-evaluate its general approach in pilot judgments.

a. The earlier Ivanov pilot judgment

Since over a decade, Ukraine has triggered the influx of a relatively high number of cases to the Court. During this time-span it has continuously been included in the high-case count countries in the Court's statistics. Since 2014 until October 2017, it has even been the State accounting for the highest percentage of pending applications.[471] The explanation behind these statistics is that Ukraine has a systemic problem of non-execution of national judgments which create a right to compensation from a government or government-controlled agency.

This issue was first discussed in the case of *Kaysin and others v. Ukraine* in 2001, not coincidentally the first judgment against Ukraine.[472] The case concerned the applicants' right to an invalidity pension which was not paid by their employer, a partly state-owned mining company. The parties reached a friendly settlement and the involved applicants received just satisfaction. The underlying issue however was not solved.

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[467] Article 46.4 ECHR; Rule 11 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, adopted on 10 May 2006 and as amended on 18 January 2017; F. DE LONDRAS, K. DZEHTSIAROU, "Mission impossible? Addressing non-execution through infringement proceedings in the European Court of Human Rights", 66 *ICLQ*, 2017, 481.

[468] E. LAMBERT ABDELGAWAD, *The execution of judgments of the European Court of Human Rights*, Council of Europe Publishing, 2008, 57.

[469] Rule 11.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, adopted on 10 May 2006 and as amended on 18 January 2017.

[470] Council of Europe Directorate of Communications, press release, *Council of Europe's Committee of Ministers launches infringement proceedings against Azerbaijan,* 5 December 2017.

[471] ECtHR, 'Analysis of Statistics 2006', 17; ECtHR, 'analysis of statistics 2007', 7; ECtHR, 'analysis of statistics 2008', 8; ECtHR, 'analysis of statistics 2009', 8; ECtHR, 'Analysis of Statistics 2010', 8; ECtHR, 'Analysis of Statistics 2011', 8; ECtHR, 'Analysis of Statistics 2012', 8; ECtHR, 'Analysis of Statistics 2013', 8; ECtHR, 'Analysis of Statistics 2014' 8; ECtHR, 'Analysis of Statistics 2015', 8; ECtHR, 'Analysis of Statistics 2016', 8; ECtHR, 'Pending applications allocated to a judicial formation 30/09/2017'.

[472] ECtHR, *Kaysin and others v. Ukraine*, application no 46144/99, 27 January 2000.

Consequently, the Court kept receiving applications following from the same underlying structural problem. Seeing this influx of similar cases, the Court decided to apply the pilot judgment procedure in order to induce Ukraine to tackle the issue. The chosen case was the one of Yuriy Nikolayevich Ivanov[473], a retired soldier who had not been paid the lump-sum pension to which he was entitled. In the case, the Court explained that more than half of its judgments against Ukraine between 2004 and 2009 had concerned non-enforcement of final decisions, and that at that moment 1400 similar applications were pending.[474] The underlying structural issues were still posing problems and there was no domestic remedy available. These applicants thus all had turned to Strasbourg. The Ukrainian State clarified that there were multiple factors creating this systemic problem: the lack of budgetary allocations, shortcomings in national legislation and administrative practice and omission or inaction on the part of the bailiffs in the national courts.[475] The Court found that this was correct, however all of these factors were under the control of the State. The Court further emphasized that remedying this would require complex general measures which should be developed under the auspices of the Committee of Ministers.[476] Similar pending cases were adjourned for a term of a year, giving the Ukrainian government the time to work out a plan with the Committee and to set up a domestic remedy.[477] The goal was then to send these similar cases back to the domestic system so that they could submit their complaint through this new domestic remedy. The Court also reprimanded Ukraine and stated that it had shown an almost complete reluctance to resolve the issue.[478] It subsequently warned that it would be forced to re-open examination of these pending cases if Ukraine failed to take the necessary measures.[479]

As clearly feared by the Court, the Ukrainian government failed to execute the Ivanov judgment. After a first extension of the time period, it was clear that the Government still had not reacted adequately. The second request for extension was thus refused and the Court resumed the examination of pending cases, hoping that this would again put pressure on the State to take action.[480] This strategy again failed. The Court started to receive complaints from applicants whose cases had already been processed and had thus been granted compensation. They informed the Court that Ukraine had again not honoured its obligation, meaning thus that the problem still had not been solved domestically.[481] Moreover, it had in the meantime grown into a major obstacle for the Court's future functioning: since 2004 the Court had received 29 000 similar applications, of which 12 143 were still pending on 12 October 2017.[482]

[473] ECtHR, *Yuriy Nikolayevich Ivanov v. Ukraine*, application no 40450/04, 15 October 2009.
[474] ECtHR, *Yuriy Nikolayevich Ivanov v. Ukraine*, application no 40450/04, 15 October 2009, §§ 83 and 86.
[475] ECtHR, *Yuriy Nikolayevich Ivanov v. Ukraine*, application no 40450/04, 15 October 2009, § 77.
[476] ECtHR, *Yuriy Nikolayevich Ivanov v. Ukraine*, application no 40450/04, 15 October 2009, § 90.
[477] ECtHR, *Yuriy Nikolayevich Ivanov v. Ukraine*, application no 40450/04, 15 October 2009, § 97.
[478] ECtHR, *Yuriy Nikolayevich Ivanov v. Ukraine*, application no 40450/04, 15 October 2009, § 91.
[479] ECtHR, *Yuriy Nikolayevich Ivanov v. Ukraine*, application no 40450/04, 15 October 2009, § 100.
[480] ECtHR, *Burmych and others v. Ukraine*, app no 46852/13, 12 October 2017, §§ 16-23.
[481] ECtHR, *Burmych and others v. Ukraine*, app no 46852/13, 12 October 2017, § 42.
[482] ECtHR, *Burmych and others v. Ukraine*, app no 46852/13, 12 October 2017, §§ 43-44.

b. Failing of a pilot judgment: the Court's approach in the Burmych case

This clear failure of its approach in the Ivanov pilot judgment and the resulting overwhelming number of similarly situated victims turning to Strasbourg triggered the Court to address the situation in the Burmych case. The Court recognized that it would have to employ a new approach, in line with the principle of subsidiarity underpinning the Convention.[483] The Court specifically asked itself whether it should act as a mechanism for awarding compensation to each and every applicant of repetitive applications which follow pilots. The Court found that this is not its task, that it has thoroughly addressed the underlying issue in its previous judgments and had assisted the State in indicating the kind of measure needed to remedy the problem. Subsequently, the Court found that these pending cases needed to be absorbed into the execution process at the Committee of Ministers and consequently struck them out of its list.

The Grand Chamber judgment was rendered by ten votes to seven. Arguably, there must have been a weighty discussion preceding it. The seven minority judges, including the Ukrainian judge,[484] attached a rather strong-worded dissent. The judges stress that this decision was taken out of efficiency considerations. According to them, it has nothing to do with human rights. They focus very much on the viewpoint of the victims by claiming that the Convention requires that each application is given an individual judicial assessment and that no victim is to be regarded by the Court as a 'burden'.[485] Further, they argue that the Court simply accepts that there is no solution and in order to release itself from the burden, it passes the buck to the Committee of Ministers. Interestingly, the dissenters state that the Committee of Ministers was not consulted concerning this new division of powers.[486] Lastly, the dissenters warn that the present solution has the perverse result of encouraging members States not to introduce general measures where a structural problem has been found to exist. During at least the next two years, nothing will happen with these cases. It is not tangible that the solution to a problem which has persisted for over sixteen years will be found at the Committee of Ministers within these two years. The Court is thus postponing having to deal with the issue again and in the meantime, the applicants will not be heard nor will they receive a binding judicial decision. The pressure on the State is off and consequently they argue that the judgment is in fact rewarding non-compliance.[487]

c. The institutional shift caused by the Burmych case

As explained above on page 62, there are roughly two ways of looking at the pilot judgment procedure. On the one hand, there is the more principled approach mostly adhered to by judges that the procedure brings the Court back to its original role: providing principled judgments concerning the Convention. This viewpoint goes hand in hand with a strong emphasis on the principle of subsidiarity: when States fulfil their duties, the Court can direct its efforts to

[483] ECtHR, *Burmych and others v. Ukraine,* app no 46852/13, 12 October 2017, § 156.
[484] The dissent was written by judges Yudkivska, Sajó, Bianku, Karakaş, De Gaetano, Laffranque and Motoc.
[485] ECtHR, *Burmych and others v. Ukraine,* app no 46852/13, 12 October 2017), Joint Dissenting Opinion,§ 1.
[486] ECtHR, *Burmych and others v. Ukraine,* app no 46852/13, 12 October 2017), Joint Dissenting Opinion,§ 11.
[487] ECtHR, *Burmych and others v. Ukraine,* app no 46852/13, 12 October 2017), Joint Dissenting Opinion,§§ 19 – 20 and 32.

analysing complex issues of human rights posed by the practice in the member States. The proponents of this perspective argue that the Court was not set up to deal with large groups of applicants bringing the same case to the Court.

On the other hand, there is the more pragmatic approach which entails that the Court is simply not capable of dealing with these large streams of cases stemming from systemic issues. As a result, it is necessary to bring the forces together of all actors involved – meaning the Court, the Committee of Ministers and hopefully, the States - in order to solve the underlying issue and thus the reason for the influx of similar applications.

The Burmych judgment approaches the problem of non-execution in the context of the pilot judgment procedure from a very principled point of view. The Court elaborately investigates what its role is from different angles. It first looks at itself through the lens of article 19 which States that the Court was set up "to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto". From this, the judgment states that this is its primary duty, and not the adjudication on awards for just satisfaction under article 41. Therefore, the Court argues that when put in the position to choose between both tasks, the Court is not held to render the same judgment over and over again while there is no live Convention issue anymore. The problem is clear, the solution as well and thus the Court has availed itself from its task.[488] This is a logical conclusion based on the Convention. It does however result in a denial of justice for the victims involved, similarly to what the dissenters argue. The Court is for them the last hope after they are not heard in their own country. With the Burmych judgment, they will thus not be heard by an independent judicial body.

Furthermore, the judgment is particularly interesting with respect to its examination based on article 46. The Court finds that in pilot judgments, it is assisting States in their duties under article 46 by indicating the type of measure that is appropriate to address the underlying systemic problem. The Committee of Ministers on the other hand is tasked with supervising the observance of these general measures by the State. As the obligation to grant relief to victims in follow-up cases is encompassed in these general measures, the Court argued that this needs to be addressed in the framework of the execution proceedings.[489] As execution is the central point here and the problems are essentially of a financial and political nature, the Court decided that the non-execution of the *Ivanov* pilot case is now the responsibility of the Committee of Ministers.[490] All similar pending applications were struck out from the Court's list and absorbed in the execution process of the Ivanov case at the Committee of Ministers. The Court however reserved the right to re-open the cases if the circumstances justify it. To this end, the Court envisaged to reassess the situation within two years of the delivery of the Burmych judgment in order to consider whether circumstances exist such as to justify a re-opening of cases.[491]

[488] ECtHR, *Burmych and others v. Ukraine*, app no 46852/13, 12 October 2017, §§ 176-182.
[489] ECtHR, *Burmych and others v. Ukraine*, app no 46852/13, 12 October 2017, §§ 156-161.
[490] ECtHR, *Burmych and others v. Ukraine*, app no 46852/13, 12 October 2017, §§ 195.
[491] ECtHR, *Burmych and others v. Ukraine*, app no 46852/13, 12 October 2017, §§ 218 – 223.

The outcome of this case is thus that the Court wants to create a system where it renders principled judgments where it diagnoses the underlying problem and indicates the kind of measured needed to remedy it. The Committee of Ministers is then tasked with dealing with the big groups of applicants accompanying these kinds of cases. However, the Committee of Ministers does not foresee the possibility for the applicants to submit their claims, or to make their individual case.[492] They can merely submit information concerning the execution of individual measures, including the payment of just satisfaction. Submissions concerning the general issue are then left to civil society, meaning national human rights institutions and NGO's. The applicants thus loose their right to access to a court. It remains however to be seen whether this strategy would be successful in prompting Ukraine to finally do away with the underlying systemic problem.

It must however be remembered that the Burmych case is quite exceptional. The only other case where the State flagrantly refuses to execute is the case of *Greens and M.T. v. the United Kingdom* concerning a blanket ban for prisoners to vote. Here, the Court had also already pointed out the problem in the individual leading case of *Hirst v. the United Kingdom*, which the government refused to execute. The Court then came out with *Greens and M.T.*, which the government still refuses to execute, comparable to the situation in Ukraine. If the strategy in *Burmych* proves successful, the Court might decide to do the same for similar cases following *Greens and M.T.* For a number of other cases however, this strategy is not necessary. Chapter V will discuss the level of execution of pilots and will show that generally, the procedure might be termed successful.

4. Conclusion: the Court as the spider in the web

The pilot judgment procedure has been criticized from two angles based on the division of competences within the Council of Europe. Firstly, it has been said to go against the principle of subsidiarity where the Court is claiming the competence to indicate to States how to execute its judgments. The Court here explains that there is no point in rendering the same judgment over and over again. More even, this is not its task under the Convention. As a result, logic dictates that it must be able to explain to States how to align themselves with their obligations under the Convention. The Court is further trying to walk a delicate line here: in most pilot cases it merely indicates the obligation to set up a domestic remedy in the operative part of the judgment. This way, it is again obliging the State to fulfil its role based on the principle of subsidiarity, rather than encroaching upon the State's territory in obliging it to change laws or practices.

Secondly, the procedure has been critised because it blurs the division of powers between the Court and the Committee of Ministers. It has been claimed that the Court is taking up supervisory powers by indicating general measures, time-limits within which to execute these and taking follow-up decisions in which it evaluates the measures set up in execution of a previous pilot. Here, the Court again emphasized that there is no use for any of the actors

[492] This was explained in "The procedure before the Committee of Ministers with respect to pilot judgments." Starting on page 93.

involved for the Court to find the same violation repeatedly. As a result, the Court is wanting to assist the Committee of Ministers by indicating that the issue at hand is systemic in nature and which kinds of general measures would be appropriate to remedy it. Time-frames might indeed be problematic, although it could be argued that the Court uses these to create a possibility for itself to go to the follow-up decisions more quickly. These follow-up decisions then involve a rather superficial assessment of the measures set up by the state in execution of a previous pilot, which will then serve as the basis for the Court to strike out similar applications from its list. In reality, the Court will mostly check whether the State has set up the domestic remedy which it required in the pilot judgment. A thorough assessment of the execution of general measures will then still be done by the Committee of Ministers.

The *Burmych* judgment has further put pressure on this power balance, although it must be remarked that this is rather an exceptional situation of an extremely reluctant state. The Court has had to clearly draw the lines of what its tasks are in the pilot judgment procedure. Following *Burmych,* the Court will focus on rendering principled judgments, including the indication of general measures. The Committee of Ministers on the other hand is tasked with supervising the execution of these general measures and dealing with the large numbers of victims involved.

With the pilot judgment procedure, the Court is in fact thus taking front stage in the proceedings. It identifies the underlying issues and the measures which would be appropriate to remedy them. It further is delegating tasks to the involved actors in order to come to a solution in the most efficient way: it indicates general measures for the States to execute and thus gives guidance to the Committee of Ministers on its supervisory task. The *Burmych* judgment shows that when confronted with a State reluctant to execute, the Court will conclude that it has fulfilled its task and will subsequently pass the buck to the Committee of Ministers.

E. The pilot judgment procedure now

The pilot judgment procedure has grown out of its infancy based on the evolving practice in the case law. It has become an integral part of the Court's procedural tools. Although it has always been a flexible tool, allowing the Court to adapt it to the circumstances of the case, it could be argued that a somewhat consolidated practice has emerged. This evolution will be discussed in this next part.

1. The codification of the procedure

The previous part has shown that the pilot judgment procedure has grown from practice, created through evolving case law. The procedure first found its legal basis in the combination of the first two paragraphs of Article 46 and article 41 of the European Convention.[493] The first paragraph of article 46 obliges the States to abide by judgments of the Court to which they are a party. The second paragraph places the burden to supervise the execution of judgments on the Committee of Ministers. Article 41 secures the possibility for the Court to order just satisfaction after a violation.[494] The combined reading of both articles results in the State's legal obligation after a finding of violation by the Court to compensate the individuals involved in the case, as

[493] ECtHR, *Broniowski v. Poland*, application no. 31443/96, 22 June 2004, § 188 – 194.
[494] Arts. 41 and 46 (1) and (2) ECHR.

well to take the individual and general measures – if so required – to put an end to the violation. The State is however free to decide the means to acquit itself from this obligation, under the supervision of the Committee of Ministers.[495]

From the very beginning, the procedure was criticized, including with arguments based on the principle of subsidiarity. The judgment of *Broniowski* explicitly referred to the Resolution (2004)3 of the Committee of Ministers as a source for the creation of the pilot judgment procedure.[496] Commenters have remarked in this regard that these resolutions are in no way binding to the Court, nor does the Court have to power to interpret and apply these instruments.[497] Secondly, the Court was said to have overstepped its boundaries and to have appropriate competences that it did not have under article 46. Specifically here, the critique is that the Court has stepped onto the territory of the Committee of Ministers on the one hand, by getting involved with the supervision of the execution of its judgments, and with the competences of the States' parties under the principle of subsidiarity on the other hand, by taking away the States' choice as to the means to respond to the Court's judgments.[498] It must however be remarked that with the *Burmych* judgment, the Court seems to retreat from both of these fields of competence and going back to its original role of setting the principles, while the States under the Committee of Ministers translate these back to the national level.

Furthermore, in the beginning phase of the procedure, it was clear that the Court was still experimenting.[499] Looking back on this experimental phase and the uncertainty brought with it, the Court was called on to codify the procedure. These calls were directed at the Court from different angles, they were coming from the CDDH,[500] the States parties,[501] and evenfrom

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[495] ECtHR, *Broniowski v. Poland*, application no. 31443/96, 22 June 2004, § 192; C. DUBOIS, E. PENNINCKX, *La procédure devant la Cour européenne des Droits de l'Homme et le Comité des Ministres*, Wolters Kluwer, 2016, 304.

[496] ECtHR, *Broniowski v. Poland*, application no. 31443/96, 22 June 2004, §190.

[497] ECtHR, *Broniowski v. Poland*, application no. 31443/96, 22 June 2004, Concurring Opinion Judge Zupančič; D. T. BJÖRGVINSSON, "The "Pilot-Judgment" Procedure of the European Court of Human Rights" in G. ALFREDSSON, J. GRIMHEDEN, B. G. RAMCHARAN, A. DE ZAYAS, *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Möller,* Martinus Nijhoff Publishers, 2009, 539.

[498] D. T. BJÖRGVINSSON, "The "Pilot-Judgment" Procedure of the European Court of Human Rights" in G. ALFREDSSON, J. GRIMHEDEN, B. G. RAMCHARAN, A. DE ZAYAS, *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Möller,* Martinus Nijhoff Publishers, 2009, 539-540; V. ZAGREBELSKY, "Violations structurelles et jurisprudence de la Cour Européenne des Droits de l'Homme", *La Nouvelle Procédure devant la Cour Européenne des Droits de l'Homme après le Protocole N° 14* , Colloquium, Ferrara, April 2005, 151 + 154. Both of these points were discussed in detail above under "Placing the pilot judgment procedure in its institutional context" starting from page 81.

[499] L. WILDHABER, "Discussion Following the Presentation by Luzius Wildhaber" in R. WOLFRUM, U. DEUTSCH, *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, International Workshop, Heidelberg, December 2007, 90; A. BUYSE, "Flying or landing? The pilot judgment procedure in the changing European human rights architecture" in O.M. Arnardóttir, A. Buyse, *Shifting Centres of Gravity in Human Rights Protection. Rethinking relations between the ECHR, EU , and national legal orders*, Routledge, 2016, 108.

[500] D. MILNER, "Discussion Following the Presentation by Luzius Wildhaber" in R. WOLFRUM, U. DEUTSCH, *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, International Workshop, Heidelberg, December 2007, 83.

[501] High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration, 19 February 2010.

within the Court itself[502]. One respondent in Strasbourg explained that there were many discussions within the Court after Broniowski, during the experimentation phase. Judges debated among each other and apparently, there was some reluctance to use the procedure at all. This reluctance mostly originated from the idea that the Court would lose its credibility if there would ever be a failed pilot judgment.[503] Another respondent clarified that the States were surprised by the Court with the conception of this procedure and they wanted some security as to the terms of its use.[504] During the Interlaken Conference of 2010, the States parties thus called on the Court to set up clear and predictable standards concerning the selection of the cases and the treatment of the other pending cases awaiting the pilot judgment.[505] Following this and parallel with the entry into force of Protocol 14, the procedure was codified into the Rules of Court in February 2011.[506]

Looking at the Rules of Court more closely, the pilot judgment procedure is provided for as follows. The Court can, on its own initiative or on the request of one or both parties, initiate a pilot judgment procedure when it is confronted with applications that reveal systemic or structural problems in a member State that could give rise to similar applications. The interviews show that up until now, pilots have only been initiated by the Court.[507] Before initiating the procedure, it must first consult with the parties whether the application results from such a problem and on the suitability of employing it.[508] The Court is however only held to consultation, the parties do not have a right to veto.[509] In rendering its judgment, the Court must then include the identification of the problem and specify the measures to be adopted in its operative provisions.[510] The Court can adjourn the examination of all pending similar applications to give the involved State the time to adopt the proposed remedial measures.[511] It can however examine an adjourned application where the "interests of the proper administration of justice so require".[512] This has happened for instance in the case of *Yuriy Nikolaeyevich Ivanov v. Ukraine*, where the Court had first adjourned similar pending cases but then resumed

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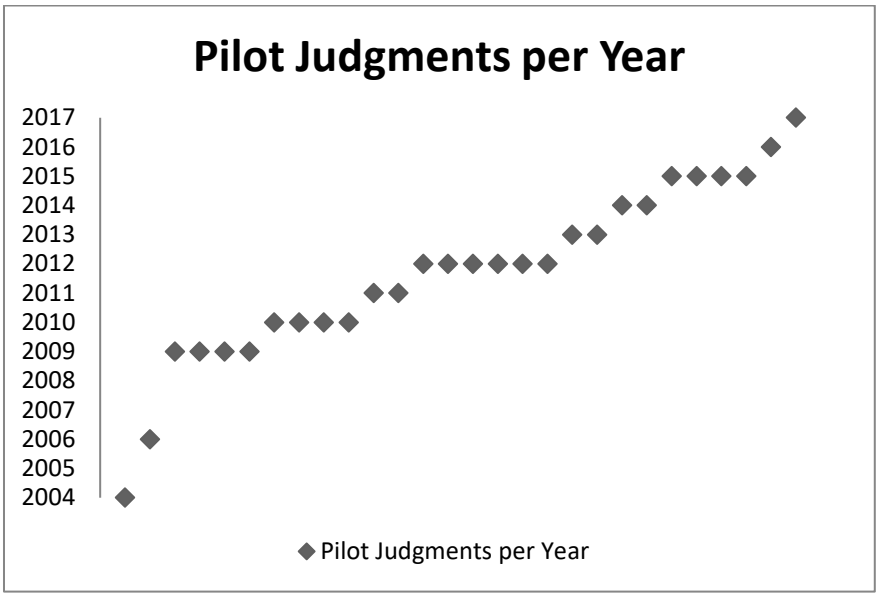
[502] ECtHR, *Broniowski v. Poland*, application no. 31443/96, 22 June 2004, Concurring Opinion Judge Zupančič; ECtHR, *Hutten-Czapska v. Poland*, application no. 35014/97, 19 June 2006, Partly Dissenting Opinion of Judge Zagrebelsky, D. T. BJÖRGVINSSON, "The "Pilot-Judgment" Procedure of the European Court of Human Rights" in G. ALFREDSSON, J. GRIMHEDEN, B. G. RAMCHARAN, A. DE ZAYAS, *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Möller,* Martinus Nijhoff Publishers, 2009, 537.
[503] Interview I dd 16.01.2017.
[504] Interview I dd 16.01.2017; Interview I dd 17.01.2017.
[505] High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration, 19 February 2010; C. DUBOIS, E. PENNINCKX, *La procédure devant la Cour européenne des Droits de l'Homme et le Comité des Ministres*, Wolters Kluwer, 2016, 301.
[506] Rule 61, Rules of Court; A. BUYSE, "Flying or landing? The pilot judgment procedure in the changing European human rights architecture" in O.M. Arnardóttir, A. Buyse, *Shifting Centres of Gravity in Human Rights Protection. Rethinking relations between the ECHR, EU , and national legal orders*, Routledge, 2016, 107.
[507] Interview I dd 16.01.2017.
[508] Rule 61.1 and 61.2, Rules of Court.
[509] P. LEACH, H. HARDMAN, S. STEPHENSON, B.K. BLITZ, *Responding to Systemic Human Rights Violations. An Analysis of 'Pilot Judgments' of the European Court of Human Rights and their Impact at National Level*, Intersentia, 2010, p. 174.
[510] Rule 61.3, Rules of Court.
[511] Rule 61.6(a), Rules of Court.
[512] Rule 61.6(c),.

their examination when the Ukrainian State did not take measures to execute the judgment.[513] In relation to the remaining cases on the docket, the Court has decided in a currently pending case to take no further procedural steps in relation to the remaining applications, while examining the leading cases of the group.[514]

The pilot judgment procedure has found its place in the contentieux of the European Court of Human Rights.[515] As of end 2017, the Court has identified 28 full pilot cases.[516]

[513] ECtHR, *Burmych and others v. Ukraine*, application nos. 46852/13 et al., 12 October 2017, § 24.
[514] European Court of Human Rights Press Release, *European Court Registrar calls for special measures to deal with influx of Hungarian pension cases*, ECHR 009 (2011), 11 January 2012.
[515] European Court of Human Rights, *Seminar Background Paper Implementation of the judgments of the European Court of Human Rights: a shared judicial responsibility?*, 2014, § 9.
[516] European Court of Human Rights Press Unit, Factsheet – Pilot Judgments, November 2017, http://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf.

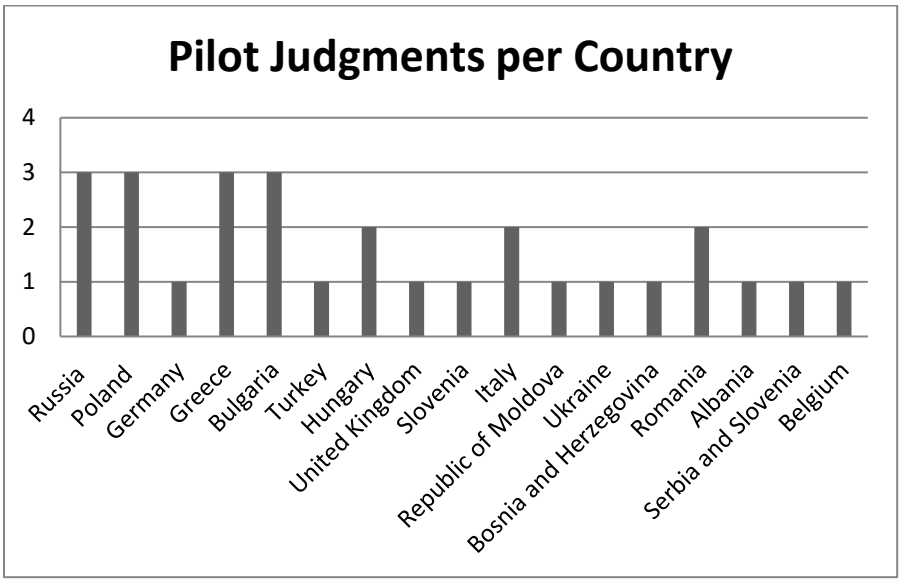
II.4 FULL PILOT JUDGMENTS PER YEAR 2004 - 2017[517]



As evident from the chart, there is a considerable increase in the use of the pilot judgment procedure starting from 2009. The Court had signalled in that year that it had the intention of applying the procedure more frequently to do away with its backlog.[518] Before 2009, there were only the 'classics': *Broniowski* and *Hutten-Czapska*. After 2009, the flexibility of the pilot judgment procedure started to show and the lines between full pilots and quasi-pilots began to blur.[519] As is also visible from the chart, the last two years of 2016 and 2017 have had less pilot judgments. There is no conclusive explanation why the numbers have dropped again. There are further some repeat players with respect to pilot cases, such as Russia, Poland, Greece and Bulgaria each of which has three pilots to its name. The spreading of pilots across the countries of the Council of Europe can be seen in the next chart.

[517] HUDOC database search; European Court of Human Rights Press Unit, Factsheet – Pilot Judgments, November 2017, http://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf.
[518] The Pilot Procedure – Memorandum prepared by the Registry of the Court, DH-S-GDR(2009)010, 24 February 2009; P.LEACH, "Tackling systemic human rights violations – the role of Pilot Judgments" in *Pilot Judgment Procedure in the European Court of Human Rights and the Future Development of Human Rights' Standards and Procedures – Third Informal Seminar for Government Agents and Other Institutions*, Kontrast, May 2009, 23.
[519] See chart – the continuum of pilots and pilot-like cases above on page 31.

II.5 PILOT JUDGMENTS PER COUNTRY 2004 - 2017[520]



2. Well-Established Case Law (WECL)

In the context of the current working methods surrounding the pilot procedure, it is important to mention the WECL ("Well-Established Case Law") procedure. This was first set up by Protocol 14 and has been further developped in the course of 2015.[521] Cases concerning issues which can be solved based on well-established case law are sent to a Committee of Three Judges to be dealt with speedily.[522] Cases coming after a pilot cases are also considered to fall under this category of WECL cases.[523] As a consequence, cases dealing with the same systemic issue coming after a pilot case will be sent to such Committees. They decide in unanimity on both the admissibility and the merits at the same time.[524] In general, the Court here aims to produce a judgment within 8 to 9 months following the introduction of the first letter of application.[525]

When introduced, this WECL procedure was especially geared towards encouraging friendly settlements, specifically with respect to repetitive cases. This was confirmed by several respondents in Strasbourg.[526] The Court previously could only suggest a friendly settlement after the decision on the merits. However, this rule was adapted to make the Court available to the parties for a friendly settlement at any time in the procedure specifically with a view to

[520] HUDOC database search; European Court of Human Rights Press Unit, Factsheet – Pilot Judgments, July 2015, http://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf.
[521] European Court of Human Rights, *The Interlaken Process and the Court (2016 Report)*, 1 September 2016, § 8.
[522] Article 28 §1 (b) Protocol 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, Council of Europe Treaty Series – No. 194, 13 May 2004.
[523] Council of Europe, *Explanatory Report to Protocol 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention*, Council of Europe Treaty Series – No. 194, 13 May 2004, § 68.
[524] Article 28.1 ECHR.
[525] Interview II dd 13.01.2017.
[526] Interview II dd 17.01.2017; Interview III dd 13.01.2017; Interview 19.01.2017.

increasing their number in the context of the WECL procedure.[527] The consequence is that the parties now receive a proposal for friendly settlement with the communication of the case.[528] In total, these Committees are said by the Court to deal with roughly 80% of all repetitive cases.[529]

This WECL procedure has however already been criticized by the Council of Europe's Directorate General of Human Rights and Rule of Law as the number of such cases being transmitted to the Committee of Ministers increase. The Directorate stated that these cases include a limited description of the facts, which makes it difficult to subsequently decide on possible individual and general measures. The friendly settlements coming out of them further predominantly focus on the payment of just satisfaction, with only six of the friendly settlements also requiring the State to undertake measures other than payment.[530] The Committees must render judgments which are able to be executed well through the Committee of Ministers, while also guarding over their function to help remedy the underlying systemic issue.

3. Streamlining the pilot judgment procedure.

The pilot judgment procedure is still developing.[531] Meanwhile internally, the pilot judgment procedure is being streamlined. As one respondent explains and is apparent from the charts on the previous pages, there was a silence between the years of 2006 and 2009: there were no full pilot judgments, only article 46 cases.[532] It's only when Rule 61 came into being that the pilot judgment procedure was again more broadly used, more and more by the different sections of the Court.[533]

The recent factsheet issued by the Court concerning the pilot procedure contains a more detailed description of the procedure than in previous years and is more clearly based on the practice of the procedure than on the initial conceptual idea of the pilot procedure. The factsheet aimed at practitioners and potential applicants contains the following elements of a pilot case: the existence of an underlying systemic issue which leads to multiple similar cases being brought to the Court; the choice of the Court to deal with one or a selection of these cases under priority treatment; the diagnosis of the problem at hand; and the indications given to the involved government of the type of remedial measures necessary to resolve the issue. It further names the possibility for the Court to adjourn similar pending cases on the condition that the Government acts promptly to adopt the required general measures a key feature of the

[527] Council of Europe, *Explanatory Report to Protocol 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention*, Council of Europe Treaty Series – No. 194, 13 May 2004, §s 92-93.
[528] Interview I dd 23.02.2017.
[529] European Court of Human Rights, *The Interlaken Process and the Court (2016 Report)*, 1 September 2016, § 8.
[530] "Remarks by the Director General of the Directorate General of Human Rights and Rule of Law" in Committee of Ministers, *Supervision of the execution of judgments and decisions of the European Court of Human Rights 2016*, March 2017, 10.
[531] Interview anonymous II.
[532] Interview I dd 16.01.2017.
[533] Interview dd 12.01.2017.

procedure. Interestingly, it specifically distinguishes between full and quasi-pilot cases. It also includes the follow-up decisions in which the Court evaluates the measures set up by the State.[534] Furthermore, a common practice has emerged to require States to submit an action plan with the Committee of Ministers within a certain time-limit as part of the general measures, instead of the Court indicating specific general measures in the original judgment.[535] This indicates that the Committee of Ministers has again received the prime responsibility in evaluating the best suited solution for implementing cases, also outside of the exceptional circumstance of Burmych. Lastly, the combination of the Single Judge procedure and the WECL procedure, both put in place by Protocol 14, has done away with a considerable part of the backlog, so that now there remain mostly meritorious Chamber cases.[536] One respondent remarked that the pilot judgment procedure will probably be used in a lot of interesting cases now that these less complex repetitive ones have been done away with.[537]

In conclusion, the pilot judgment procedure in the years before the codification was not widely used within the Court. The codification however made it workable for the Chambers within the Court to do away with repetitive cases due to systemic issues. The procedure has now grown out of its infancy and has taken its place in the procedural tools of the Court. There is further an emerging standard practice in which the Court has returned from its previous bold position where it indicated specific general measures in pilots, to reserving a much more active role for the Committee of Ministers again.

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[534] European Court of Human Rights, *Factsheet – Pilot judgments*, October 2017, http://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf.
[535] Interview I dd 17.01.2017.
[536] Interview anonymous I. This point will be revisited in more detail below on page 122.
[537] Interview II dd 13.01.2017.

III. Procedural efficiency – looking at the pilot judgment procedure from the perspective of the Court.

This research is attempting to uncover and subsequently evaluate how the pilot judgment procedure is working in practice from two viewpoints, one of which is procedural efficiency. Specifically, the research will focus on the viewpoints of the procedure's users at the side of the Court. How do they work with this procedure and how do they tweak it in order to use it efficiently? What factors do they take into account and how do they weigh in their decisions?

To this end, this chapter will firstly describe what the current stance is on pilot judgments and efficiency (A.). Secondly, the viewpoint of the Council of Europe on the concept of procedural efficiency will be examined (B.), which in turn will inspire the operationalization in this thesis of procedural efficiency, as will be explained in a third-subchapter (C.). This operationalization is further based on numbers and statistics made publically available by the Court. This information is combined in order to explain how the questions were drafted that were subsequently put to the respondents at the Court. The fourth sub-chapter will outline the experiences of these respondents based on the elements of efficiency as operationalized in the previous part (D.). Lastly, the researcher will conclude whether the pilot judgment procedure indeed fulfils its role in terms of procedural efficiency based on the experiences of the respondents at the Court (E.).

A. The current stance on pilot judgments and efficiency

Much has already been written about the role of the pilot procedure in the context of the efficiency of the European Court of Human Rights and whether it is fulfilling that role.[538] Increasing efficiency related to the Court's enormous backlog was always one of the goals of the procedure and it still is. The Registry in its most recent factsheet concerning pilots has indicated that the goals of the procedure are threefold, including to help the Court to manage its workload more efficiently by reducing the number of similar, usually complex, cases that have to be examined in detail.[539] This goal already reveals something about the kinds of cases that the procedure is designed to deal with. In one of its most recent decisions concerning the procedure, the Court itself detailed that it served in essence two objects: on the one hand it is meant to reduce the threat to the effective functioning of the Convention system, while on the

[538] Among others: A. BUYSE, " The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges", *Nomiko Vima (Greek Law Journal): European Court of Human Rights - 50 Years*, 2010; P. LEACH, "Tackling systemic human rights violations – the role of Pilot Judgments" in *Pilot Judgment Procedure in the European Court of Human Rights and the Future Development of Human Rights' Standards and Procedures – Third Informal Seminar for Government Agents and Other Institutions*, Kontrast, May 2009, 23; D. HAIDER, *The Pilot Judgment Procedure of the European Court of Human Rights*, Martinus Nijhoff Publishers, 2013; A. UZUN MARINKOVIĆ, K. KAMBER, "Fostering Domestication of Human Rights Through the Exhaustion of Domestic Remedis – A lesson Learned from the ECtHR Pilot and Leading Judgment Procedures", *Inter-American and European Human Rights Journal*, 2016; E. LAMBERT ABDELGAWAD, "The Execution of the Judgments of the European Court of Human Rights: Towards a Non-coercive and Participatory Model of Accountability", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2009; F. FAVUZZA, "*Torreggiani* and Prison Overcrowding in Italy", *Human Rights Law Review*, 2017.

[539] European Court of Human Rights, factsheet – Pilot judgments, October 2017, http://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf.

other it is designed to facilitate a speedier resolution of the issue for the individuals involved.[540] The *Burmych* judgment further shows that in situations where the Court is overwhelmed by an enormous amount of incoming cases, it will prefer efficiency. Efficiency in the form of the swift processing of incoming cases has thus remained one of the primary underlying motivators for applying the pilot judgment procedure. Finding a solution for the victims of these large-scale human rights violations is the other, a focus which will be discussed in depth in chapter IV concerning Access to Justice.

In the context of efficiency, it is important to know which kinds of cases are involved when talking about the pilot judgment procedure. Back in 2005, the Lord Woolf report already warned that a lot of the cases included in the backlog of the Court at that time were meritorious Chamber cases. He predicted that the Court, while focussing on increasing its efficiency and upping its clearance rate would be tempted to focus on the clearly inadmissible cases, whose share in the incoming caseload was estimated at around 95% of applications at that time. However, the Lord Woolf report reckoned that up to 40% of the pending backlog of the Court – meaning the cases which have exceeded the time-limit allowed for at each stage of the proceedings – was made up of Chamber cases. With Chamber cases he refers to cases which are admissible and raise a serious, complex human rights issue. They thus require more work from the Registry.[541] This is exactly what has happened. The explanatory report to Protocol 14 clarifies that measures aimed at increasing the efficiency of the Court must be focussed on the two groups of cases which are predominantly responsible for the huge case-load of the Court. The first group are the inadmissible cases, these represented some 90% of incoming cases at that time. The second group are the repetitive cases.[542]

The Single Judge procedure[543] has done away with a huge number of these first category cases in the Court's backlog. These cases are however by their very nature unmeritorious. During the Oslo Conference, the President of the Court clarified that of the 90.000 cases decided in 2013, 80.000 were inadmissibility decisions rendered by a Single Judge.[544] Moreover, since the Court did not motivate its judgments in these cases until recently, they were quickly dealt with.[545] The Court however remained with these second category of Chamber cases, a big part of which were repetitive. The Single Judge procedure alone was thus not the solution to the Court's case overload problem. [546] These repetitive cases in and of themselves represent a considerable part

[540] ECtHR decision, *Załuska and Rogalska v. Poland*, application nos. 53491/10 and 72286/10, 20 June 2017, § 29.
[541] The Right Honourable The Lord Woolf, *Review of the Working Methods of the European Court of Human Rights*, December 2005, 49.
[542] Council of Europe, *Explanatory Report to Protocol 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention*, Council of Europe Treaty Series – No. 194, 13 May 2004, § 7.
[543] A Single Judge can take a decision concerning the admissibility of a case in a fast-track procedure, when such a decision can be made without further examination. The decision of the Single Judge is final; article 27 ECHR.
[544] Conference on the long-term future of the European Court of Human Rights, Session I – History, Reforms and Remaining Challenges, speech by Dean Spielmann, Oslo, 8 April 2014, 44.
[545] European Court of Human Rights Press Release, *Launch of new system for Single Judge decisions with more detailed reasoning*, ECHR 180 (2017), 1 June 2017.
[546] Conference on the long-term future of the European Court of Human Rights, Session I – History, reforms and remaining challenges, speech by Dean Spielmann, Oslo, 8 April 2014, 44.

of the Court's backlog. Eric Friberg, former Registrar at the European Court, has noted in 2011 that it would take 20 years for the Court to render a judgment on all these recurring cases individually.[547] It is in this category of cases that the pilot judgment procedure is to be situated.

Former Judge Mahoney has claimed that the pilot judgment procedure will not necessary reduce the work of the Court regarding the already pending cases. Its role would be preventive, obstructing streams of cases coming in which are primarily geared towards awarding victims just satisfaction.[548] The practice of the Court's closing cases via decisions - such as *Anastasov v. Slovenia* after the *Kurić* pilot case, *E.G. v. Poland and 175 other Bug River applications* after *Broniowski* and the *Association of Real Property Owners in Łódź and others v. Poland* decision closing the *Hutten-Czapska* pilot - seem to suggest that the amount of compensation plays an important part here and that the Court has successfully created a practice in which it can confidently send these cases back to the respective domestic systems to deal with.[549]

In the same line, former President of the Court Wildhaber[550] has raised the point that using the pilot judgment procedure could also be a way of setting the Court's priorities straight. A lot of these full pilot cases deal with technical procedural issues, such as the length of civil or criminal proceedings in several States and non-enforcement of domestic judgments.[551] Certainly in these kinds of cases, it is not the Court's role to decide on these issues over and over again. He argued that there should be a better recognition and acceptance of priorities, so that the Court can

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[547] L. WILDHABER, "Criticism and Case-overload: Comments on the Future of the European Court of Human Rights", in S. FLOGAITIS, T. ZWART, J. FRASER (eds.), *The European Court of Human Rights and its Discontents*, Edward Elgar, 2013, 14; referring to E. Fribergh, "First Experiences with Protocol No.14 and Further Need for Reform" in S. Besson (ed.), *The European Court of Human Rights After Protocol 14: Preliminary Assessment and Perspectives*, Forum Europarecht – Forum droit européen, Schulthess, 2011, 119.

[548] P. MAHONEY, "Discussion Following the Presentation by Luzius Wildhaber" in R. WOLFRUM, U. DEUTSCH, *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, International Workshop, Heidelberg, December 2007, 87.

[549] ECtHR, decision, *Anastasov and others v. Slovenia*, application no. 65020/13, 18 October 2016; ECtHR, decision, *E.G. v. Poland and 175 other Bug River applications*, application nos. 50425/99 and 175 others, 23 September 2008; ECtHR, decision, *Association of Real Property Owners in Łódź and others v. Poland*, application no. 3485/02, 8 Mach 2011.

[550] Luzius Wildhaber was judge for Switzerland in the Court between 1991 and 2006 and was President from 1 November 1998 until 18 January 2007.

[551] The following nine pilot cases concerned excessive length of proceedings: ECtHR, *Michelioudakis c Grèce*, application no. 54447/10, 3 April 2012; ECtHR, *Glykantzi v. Greece*, application no. 40150/09, 30 October 2012; ECtHR, *Ümmühan Kaplan v. Turkey*, application no. 24240/07, 20 March 2012; ECtHR, *Vassilios Athanasiou et autres v. Greece*, application no. 50973/08, 20 December 2010; ECtHR, *Rumpf v. Germany*, application no. 46344/06, 2 September 2010; ECtHR, *Finger v. Bulgaria*, application no. 37346/05, 10 May 2011; ECtHR, *Dimitrov and Hamanov v. Bulgaria*, application nos. 48059/06 and 2708/09, 10 May 2011; ECtHR, *Rutkowski and others v. Poland*, application nos. 72287/10, 13927/11 and 46187/11, 7 July 2015; ECtHR, *Gazsó v. Hungary*, application no. 48322/12, 16 July 2015. Five pilot cases concerned non-execution of domestic decisions: ECtHR, *Gerasimov and others v. Russia*, application nos. 29920/05, 3553/06, 18876/10, 61186/10, 21176/11, 36112/11, 36426/11, 40841/11, 45381/11, 55929/11, 60822/11, 1 July 2014; ECtHR, *Manushaqe Puto and others v. Albania*, application nos. 604/07, 43628/07, 46684/07 and 34770/09, 31 July 2012; ECtHR, *Burdov v. Russia (no. 2)*, application no. 33509/04, 15 January 2009; ECtHR, *Yuriy Nikolayevich Ivanov v. Ukraine*, application no. 40450/04, 15 October 2009; ECtHR, *Olaru and others v. Moldova*, application nos. 476/07, 22539/05, 17911/08 and 13136/07, 28 July 2009.

effectively deal with cases that concern grave violations of human rights.[552] The pilot judgment procedure could be argued to do just that: do away with these kinds of technical issues in a swift manner, leaving the Court more resources to allocate towards the most serious cases.

The Court itself seems to applaud the pilot judgment procedure for reducing the treat to the Convention system. In its *Stella* decision, by which it closed the issue of prison overcrowding in Italy following the *Torreggiani* pilot case, the Court stated that the pilot judgment here had as a direct result the creation of some national laws which would lead to the end of the large number of similar pending cases at the Court.[553] This positive evaluation of the pilot judgment in the systemic issue of prison overcrowding in Italy has also been affirmed in the literature, claiming even that this type of judgment might be marked as being more efficient in inducing the State to ameliorate the domestic situation.[554] Yet, the *Torreggiani* solution was controversial. One of the measures that was taken was the de-criminalisation of certain drug offences, which lead to the release of many detainees.[555] This was however not deemed a long-term solution.[556]

Subsequently turning to the numbers the procedure indeed seems to do its job. The question here is: under which circumstances will the procedure be efficient? In order to answer this question, this doctoral research want to add a perspective to this discussion. This research is also concerned with the experience of the persons working with this procedure: which parameters are needed for the pilot procedure to function as projected and how do the users use these parameters in order to make them fit the circumstances?

B. How does the Council of Europe see efficiency?

The Council of Europe itself has performed a lot of work concerning the efficiency of justice and how to measure this concept. Especially the Council of Europe's European Commission for the Efficiency of Justice (CEPEJ) has developed elaborate parameters of efficiency.

When looking at a court as a system, it can be posed that it works in a simple 'system-model', which means that it differentiates between input, throughput and output. With regard to the input, resources and cases are distinguished. A court has three kinds of resources: personnel, material and financial resources. [557] The throughput of a court is the process where an incoming case is dealt with by the judges and court staff, resulting in a judgment. Here again, the length of proceedings and the backlog in cases is one of the indicators looked at to measure the throughput.[558] The output is then the eventual judgment and its execution.

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[552] L. WILDHABER," Discussion Following the Presentation by Luzius Wildhaber" in R. WOLFRUM, U. DEUTSCH, *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, International Workshop, Heidelberg, December 2007, 91.
[553] ECtHR, decision, *Stella and others v. Italy*, application no. 49169/09, 16 September 2014, § 43.
[554] F. FAVUZZA, "*Torreggiani* and Prison Overcrowding in Italy", *Human Rights Law Review*, 2017, 172; referring to Haider, The Pilot-Judgment Procedure of the European Court of Human Rights (2013) at 54.
[555] Interview II dd 18.01.2017.
[556] Interview anonymous III.
[557] P. ALBERS, "Performance indicators and evaluation for judges and courts", CEPEJ, p. 2, http://www.coe.int/t/dghl/cooperation/cepej/events/OnEnParle/MoscowPA250507_en.pdf.
[558] P. ALBERS, "Performance indicators and evaluation for judges and courts", CEPEJ, p. 2, http://www.coe.int/t/dghl/cooperation/cepej/events/OnEnParle/MoscowPA250507_en.pdf.

We look at the court as a system because the performance of an individual judge is influenced by external factors, such as changes in the budget and reforms in the legal context they are working in. Since a number of these factors are out of the reach of the judge, an integral approach of looking at the performance of courts and judges is necessary. This integral approach is realized by looking at six performance indicators: the caseload per judge, (labour) productivity, duration of proceedings, cost per case, clearance rate, and the budget of the court.[559] Since allocating the budget of the European Court is based on a political process, this research will not look at this parameter. There are also no public numbers on costs per case available, making it impossible to research this parameter. Identifying the problem that the European Court of Human Right is plagued with, that is the increasing case-load due to recurring cases, resulting in the prolonged time it takes for the Court to deliver judgments, this doctoral research will thus focus on the four abovementioned parameters of caseload, productivity, duration of proceedings and clearance rate. These factors will subsequently each be elaborated on.

C. Explanation of how efficiency is used in this dissertation

This research is also concerned with the experiences of the persons working with this procedure: do they consider it to be an efficient tool and how do they make this work? Therefore, the research will focus on questions concerning caseload, time management and productivity and how these users of the procedure on the side of the Court tend to 'tweak' the procedure in order to make it more efficient in a given case.[560] Because, as judge Nicholas Bratza said in 2005: "*an imaginative use of pilot judgments could do much to reduce the Court's burden*".[561] This idea was also supported by one of the Strasbourg respondents, stating that the pilot judgment procedure is part of the freedom of the Court in order to keep a coherent line in its case law. To cast the procedure in a mould, is to curtail that freedom.[562]

The parameters developed by the CEPEJ are taken as the basis for the questions. There are many other sources that have created variations or completely different criteria for assessing the efficiency of a court system.[563] The CEPEJ criteria however are arguably the most logical choice as they are used by the Council of Europe itself to evaluate judicial efficiency.

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[559] P. ALBERS, "Performance indicators and evaluation for judges and courts", CEPEJ, p. 3, http://www.coe.int/t/dghl/cooperation/cepej/events/OnEnParle/MoscowPA250507_en.pdf.

[560] The concrete questions posed to the respondents can be found in annex 2.

[561] N. BRATZA, "The Changing Landscape of the European Court", speech given to Middle Temple, 5 October 2005; The Right Honourable The Lord Woolf, *Review of the Working Methods of the European Court of Human Rights*, December 2005, p. 40.

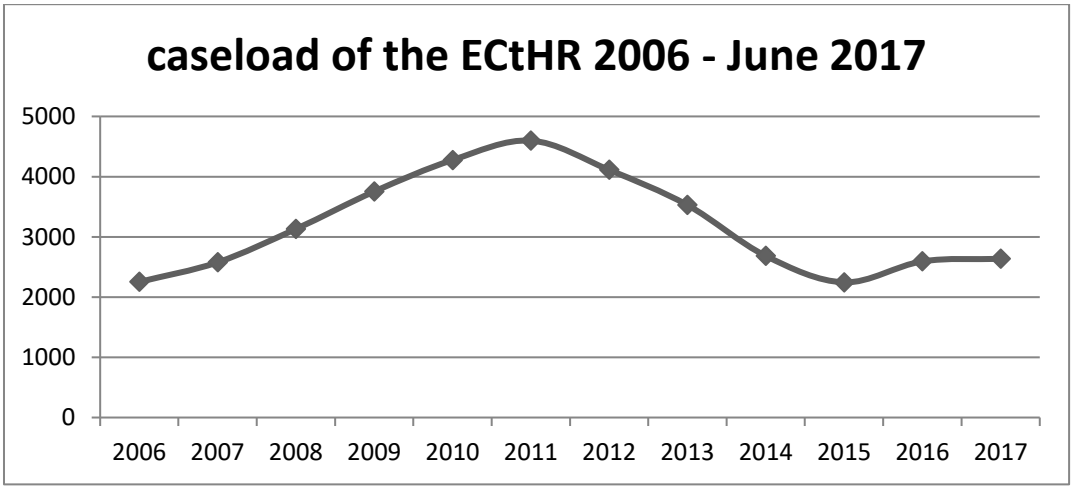
[562] Interview II dd 13.01.2017.

[563] See, among others, the parameters used by the European Union (length of proceedings, clearance rate, and pending cases), see European Commission – Directorate-General for Justice, *The 2016 EU Justice Scoreboard*, COM(2016) 199 final, 2016. The US Department of Justice has standards concerning overall performance, encompassing access to justice; expedition and timeliness; equality, fairness and integrity; independence and accountability; and public trust and confidence. See U.S. Bureau of Justice Assistance, *Trial Court Performance Standards With Commentary*, NCJ 161570, July 1997. The Economics Department of the Organisation for Economic Co-operation and Development (OECD) seems to focus predominantly on length of proceedings, see OECD, "What makes civil justice effective?", *OECD Economics Department Policy Notes No. 18*, 18 June 2013.

1. Case-load

The most evident way to calculate the caseload per judge[564] is to divide the total number of incoming cases and pending cases to the total number of judges.[565] The total caseload number of the Court can be calculated on the basis of the statistics released by the European Court itself each year.[566] This chart shows the following evolution between 2006 and 2017. The chart shows that the caseload follows the same evolution as the evolution in the total number of pending cases. Due to the higher number of pending cases in 2011, the caseload naturally was high as well. The numbers have gone down after that, with a short-term boost again from end of 2016 to mid-2017. It could be questioned whether the pilot judgment procedure has had an impact on this general downfall of the numbers after 2011.

III.1 CASELOAD OF THE ECTHR AS A WHOLE 2006-2017



This will however not present a complete image of the caseload per judge, since the European Court performs its tasks in differing formations: single-judge cases, in a Committee of Three Judges, Chamber formations of seven judges, and Grand Chamber panels of seventeen judges.[567] Where a case will be dealt with depends on the priority given to it and the category to which it will be assigned. This will be explained in the context of the question of simplicity/complexity below.

As to the part pilot cases play in this caseload of the Court, the statistics show that pilot judgments as such do not impact the numbers considerably. However, the way that similar applications are dealt with following a pilot case through the WECL procedure will have an

[564] As will be explained below under Productivity on page 117, there are no clear numbers as to the total number of lawyers working at the Court. It is however fixed that there are 47 judges working at the Court. Consequently, the caseload parameter here is calculated on the basis of the number of judges only.

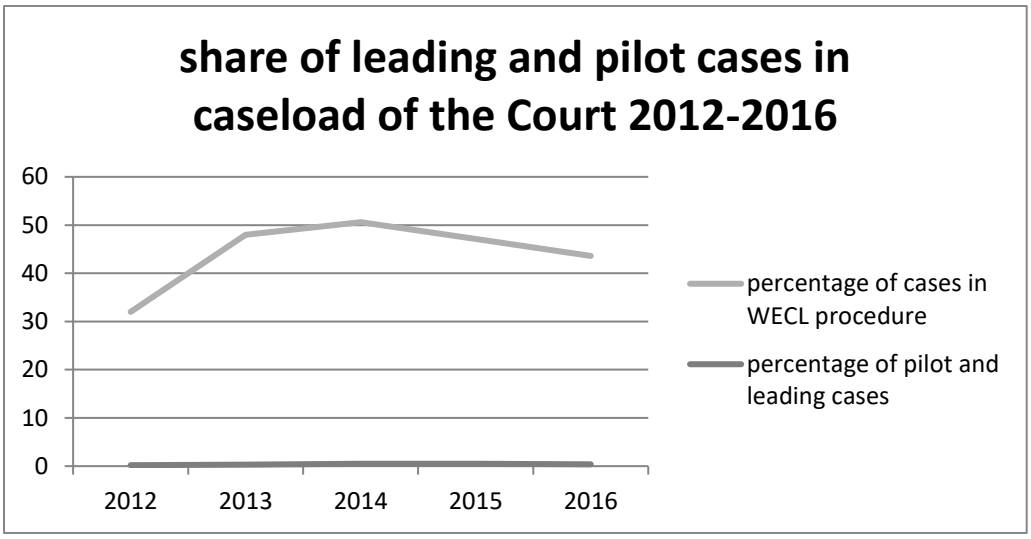
[565] P. ALBERS, "Performance indicators and evaluation for judges and courts", CEPEJ, p. 4, http://www.coe.int/t/dghl/cooperation/cepej/events/OnEnParle/MoscowPA250507_en.pdf.

[566] This chart is based on statistics provided by the ECtHR per year, accessible here: http://www.echr.coe.int/sites/search_eng/pages/search.aspx#{"sort":["createdAsDate Descending"],"Title":["\"analysis of statistics\""],"contentlanguage":["ENG"]}; the recent statistics until June 2017 can be accessed here: http://www.echr.coe.int/Documents/Stats_annual_2017_ENG.pdf.

[567] Article 26.1 ECHR.

effect. We can see that this category of WECL-cases form almost half of the Court's pending applications.

III.2 SHARE OF LEADING AND PILOT CASES IN THE TOTAL CASELOAD OF THE COURT 2012-2016



This chart is a combination of the data in the statistics compiled by the Court and the Court's priority policy.[568] It shows a considerable decline in the Court's caseload concerning the cases dealt with under the WECL procedure. The percentage of pilot and leading cases is negligible in comparison to those numbers. This thus confirms the fact that most of the Court's caseload consists of repetitive cases. Included in this data are the cases falling under the Court's priority category II: cases which reveal systemic issues and are thus subject to the pilot judgment procedure and so-called leading cases. These two categories are not split up. However, as this category forms merely an extremely small part of the Court's caseload, this does not necessarily present a problem in order to show the total impact of the pilot procedure on the Court's caseload. Further, a much bigger part of the Court's caseload is situated in category V cases: repetitive cases. These are part of the so-called WECL cases which are dealt with by a Committee of Three Judges based on well-established case law. They mostly follow pilot cases and leading cases as well. Furthermore, the Court has only begun to provide this specific statistical information since 2012. Based on the Court's own statistics it is hard to render clear information concerning the impact of the pilot judgment procedure on the Court's caseload.

In sum, caseload is calculated as the rate of cases per judge or per lawyer. As a result, it could be argued that this parameter can be looked at from the perspective of these professionals. Therefore, the experiences of the persons working with this caseload may help to offer a more complete view of this element of efficiency. In this sense, during the interviews the experience

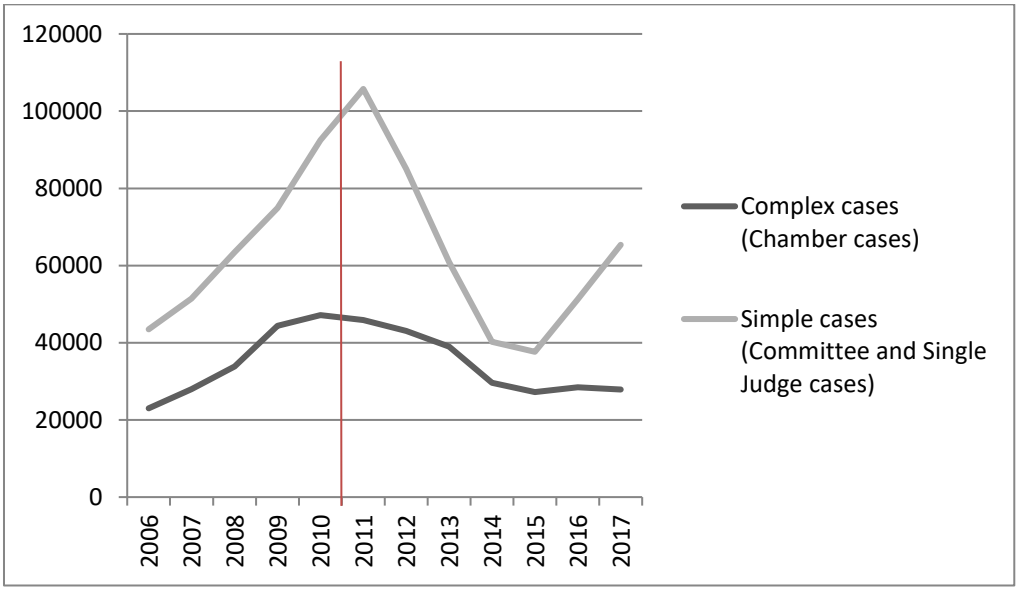
[568] This chart is based on statistics provided by the ECtHR per year, accessible here: http://www.echr.coe.int/sites/search_eng/pages/search.aspx#{"sort":["createdAsDate Descending"],"Title":["\"analysis of statistics\""],"contentlanguage":["ENG"]}; the recent statistics until June 2017 can be accessed here: http://www.echr.coe.int/Documents/Stats_annual_2017_ENG.pdf; European Court of Human Rights, *The Court's priority policy*, available at: http://www.echr.coe.int/Documents/Priority_policy_ENG.pdf.

concerning their caseload was discussed with judges and lawyers at the Court. More specifically, questions as to how they manage their case-load and the role of the pilot judgment procedure in this came up.

2. Simplicity/complexity of cases

Additionally, this way of looking at caseload, oversimplifies the work of judges: some cases are simple, while others are more complex.[569] The Court itself divides cases in categories according to their simplicity or complexity. Complex cases are allocated to a Chamber or the Grand Chamber. Simpler meritorious cases are allocated to the Committees of Three Judges and clearly inadmissible cases are decided by Single Judges. Using this data, we can see that the highest fluctuation takes place in the category of the simplest cases, encompassing the Committee and Single Judge cases. It must be noted that the Single Judge procedure was only in place with respect to all Council of Europe member States since 2010 with the entry into force of Protocol 14.[570] The red line in the graphs indicates the start of the Single Judge procedure.

III.3 EVOLUTION IN THE ECTHR'S PENDING CASES, SPLIT IN SIMPLE AND COMPLEX CASES 2006-2017

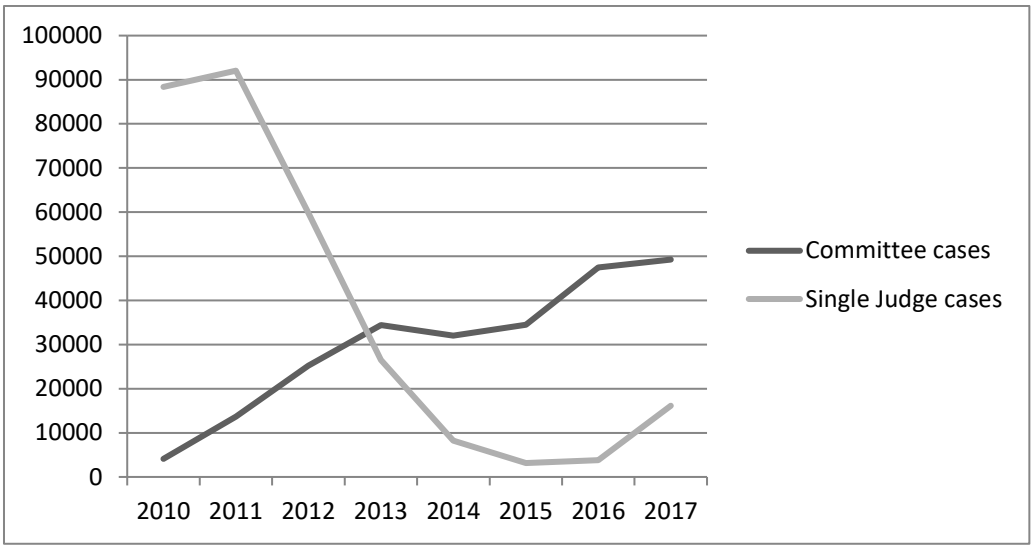


It is clear that the highest fluctuation is noticeable within the category of simple cases. This can be either due to the Single Judge procedure dealing with large groups of inadmissible individual cases. It can also be linked to the existence of a pilot case, which in turn makes it easier for the Committees to render a fast-track judgment on similar follow-up cases or make the claims in these follow-up cases simply inadmissible and thus susceptible to a decision by a Single Judge.

[569] P. ALBERS, "Performance indicators and evaluation for judges and courts", CEPEJ, p. 4, http://www.coe.int/t/dghl/cooperation/cepej/events/OnEnParle/MoscowPA250507_en.pdf.
[570] The Single Judge procedure was however already in place from May 2009 with respect to the states that signed and ratified Protocol 14bis.

As a result, it is important to know if this evolution within the simple cases is mostly due to Committee judgments or to Single Judge decisions.

III.4 EVOLUTION IN THE ECTHR'S PENDING CASES WITHIN SIMPLE CASES, SPLIT IN COMMITTEE CASES AND SINGLE JUDGE CASES 2010-2017[571]



This chart reveals that the rapid decline in simple cases starting 2011 was mostly due to Single Judge cases. Committee cases however started to grow. The creation of the WECL procedure which came into operation from 2010 for all Council of Europe States however could be an explanation for this increase.

3. Productivity

Productivity is an indicator that provides information about the production delivered by judges and court staff, in terms of judicial decisions. It is the most widely used measure and is calculated by dividing the total output of judgments and decisions by the number of personnel or the number of hours worked.[572] It is also possible to look at the productivity of the court system as a whole. Referring back to the resources of the court, it must be noted that modifying these different resources can each have an impact on the productivity, and thus efficiency, of the Court.[573]

The Court does not publicly release information concerning the composition of its human resources. One of the respondents however elaborated on the limited capacity of the Court:

> *"We have a limited capacity. We have almost two hundred fifty lawyers, forty seven judges, we have more than 800 million potential clients. So, the Court does not have the capacity to deal with thousands of cases, which might come from different*

[571] As the Single Judge procedure was only introduced after the entry into force of Protocol 14 in 2010, this Chart only takes its start from then on.
[572] P. ALBERS, "Performance indicators and evaluation for judges and courts", CEPEJ, p. 5, http://www.coe.int/t/dghl/cooperation/cepej/events/OnEnParle/MoscowPA250507_en.pdf.
[573] P. ALBERS, "Performance indicators and evaluation for judges and courts", CEPEJ, p. 2 & 7, http://www.coe.int/t/dghl/cooperation/cepej/events/OnEnParle/MoscowPA250507_en.pdf.

> *countries.[…]If we want to deal with every single case, repetitive case, then you have to have several buildings around here and you need to recruit thousands of lawyers and you need to give rulings in each of those cases, which is practically impossible!"*[574]

These numbers might however have fluctuated over the years. Indeed, one of the respondents has indicated that at one point, the Court did hire more lawyers in order to deal with the backlog.[575] Consequently, it is not possible to make an analysis of the evolution in the Court's productivity which is based on correct statistics, as these are not publicly available. The experiences surrounding this issue in the context of the pilot judgment procedure, existing among the interviewees working at the Court will however be included in the next sub-chapter dealing with the experiences of the Court's personnel.

4. Length of proceedings

Another indicator of performance can be defined in relation to the length of proceedings.

[574] Interview III dd 13.01.2017. In 2011, that number was a bit higher and estimated at 270 case lawers, see Y. HAECK, C. BURBANO HERRERA, *Procederen voor het Europees Hof voor de Rechten van de Mens*, Intersentia, 2011, 152.
[575] Interview II dd 17.01.2017.

III.5 LENGTH OF PROCEEDINGS AT THE ECTHR

name of the case	date of the case	date of application	total length of proceedings
Broniowski v. Poland	22/06/2004	12/03/1996	8 years, 3 months
Hutten-Czapska v. Poland	19/06/2006	6/12/1994	11 years, 6 months
Burdov v. Russia (no. 2)	15/01/2009	15/07/2004	4 years, 6 months
Olaru and others v. Moldova	28/07/2009	11/12/2006; 31/05/2005; 2/04/2008; 3/01/2007	2 years, 6 months -4 years, 2 months
Yuriy Nikolayevich Ivanov v. Ukraine	15/10/2009	13/09/2004	5 years, 1 month
Suljagic v. Bosnia and Herzegovina	3/11/2009	2/07/2002	6 years, 7 months
Rumpf v. Germany	2/09/2010	10/11/2006	3 years, 10 months
Maria Atanasiu and others v. Romania	12/10/2010	11/08/2005; 4/08/2004	5 years, 2 months-6 years, 2 months
Greens and M.T. v UK	23/11/2010	14/11/2008	2 years
Vasilios Athanasiou and others v. Greece	21/12/2010	6/10/2008	2 years, 2 months
Finger v. Bulgaria	10/05/2011	6/10/2005	6 years, 5 months
Dimitrov and Hamanov v. Bulgaria	10/05/2011	10/11/2006; 6/01/2009	2 years, 4 months-4 years, 7 months
Ananyev and others v. Russia	10/01/2012	14/09/2007	4 years, 4 months
Ümmühan Kaplan v. Turkey	20/03/2012	23/05/2007	4 years, 10 months
Michelioudakis v. Greece	3/04/2012	4/09/2010	1 year, 7 months
Kuric and others v. Slovenia	26/06/2012	4/07/2006	5 years, 11 months
Manushaqe Puto and others v. Albania	31/07/2012	16/11/2006	5 years, 8 months
Glykantzi v. Greece	30/10/2012	9/07/2009	3 years, 2 months
Torregiani and others v. Italy	8/01/2013	seven applications, between 08/2009 and 07/2010	3 years, 5 months-2 years, 6 months
M.C. and others v. Italy	3/09/2013	29/11/2010	2 years, 10 months
Gerasimov and others v. Russia	1/07/2014	11 applications between 07/2005 and 08/2011	2 years, 11 months - 9 years
Alisic and others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia	16/07/2014	30/07/2005	9 years
Neshkov and others v. Bulgaria	27/01/2015	six applications between 06/2010 and 12/2012	2 years, 1 month - 4 years, 7 months
Varga and others v. Hungary	10/03/2015	six applications between March and October 2013	2 years - 1 year and 5 months
Rutkowski and others v. Poland	7/07/2015	30/11/2010; 21/02/2011; 21/07/2011	4 years, 8 months - 4 years
Gazso v. Hungary	16/07/2015	24/07/2012	3 years
W.D. v. Belgium	6/09/2016	28/10/2013	2 years, 11 months
Rezmives v. Romania	25/04/2017	14/09/2012; 6/06/2013; 24/07/2013; 15/10/2013,	4 years, 7 months - 3 years, 6 months

This table shows the length of procedure at the Court in pilot cases, starting from the date of the first application in the case to the date of the judgments. The numbers range from one year and seven months to eleven years and six months.

To further conceptualize the indicator of length of proceedings, the CEPEJ has developed a time-management checklist as a practical tool for courts.[576] This checklist is intended to enable courts of member States of the Council of Europe to collect appropriate information and analyse the factors that influence the duration of proceedings.[577] However, it could also be applied to the European Court of Human Rights itself. It includes six indicators that influence the length of proceedings.

Firstly, Courts should have the ability to assess the overall length of proceedings, through the identification of court proceedings from the user's perspective and the establishment of the integral length of proceedings.[578] Secondly, Courts must establish standards for the duration of proceedings, through the definition of optimum time-frames and increase the foreseeability of these time-frames.[579] Thirdly, resulting from a differentiated complexity of cases, courts must employ a sufficiently elaborated typology of cases with regard to time consumption.[580] Fourthly, Courts should develop the ability to monitor the course of proceedings through the collection of data concerning the timing of the most important stages of the proceedings.[581] Fifthly, Courts must develop means to promptly diagnose delays and to mitigate their consequences. To this end, responsibility for the identification and avoidance of delays must be clearly attributed, emergency policies should be put in place and procedural means to accelerate proceedings should be developed.[582] Lastly, Courts should be aware of the added benefit of using modern technology as a tool for time management. Technology in this regard can be used to monitor the length and delays of proceedings and can act as tools for statistical processing and planning in the area of time-frames.[583] In the chart in Annex 5 "VI-b Detailed overview of

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[576] P. ALBERS, "Performance indicators and evaluation for judges and courts", CEPEJ, p. 7-8, http://www.coe.int/t/dghl/cooperation/cepej/events/OnEnParle/MoscowPA250507_en.pdf.

[577] European Commission for the Efficiency of Justice, *Time Management Checklist*, 9 December 2005, https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ%282005%2912&Sector=secDGHL&Language=lanEnglish&Ver=rev&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6

[578] European Commission for the Efficiency of Justice, *Time Management Checklist*, 9 December 2005, https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ%282005%2912&Sector=secDGHL&Language=lanEnglish&Ver=rev&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6

[579] European Commission for the Efficiency of Justice, *Time Management Checklist*, 9 December 2005, https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ%282005%2912&Sector=secDGHL&Language=lanEnglish&Ver=rev&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6

[580] European Commission for the Efficiency of Justice, *Time Management Checklist*, 9 December 2005, https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ%282005%2912&Sector=secDGHL&Language=lanEnglish&Ver=rev&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6

[581] European Commission for the Efficiency of Justice, *Time Management Checklist*, 9 December 2005, https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ%282005%2912&Sector=secDGHL&Language=lanEnglish&Ver=rev&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6

[582] European Commission for the Efficiency of Justice, *Time Management Checklist*, 9 December 2005, https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ%282005%2912&Sector=secDGHL&Language=lanEnglish&Ver=rev&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6

[583] European Commission for the Efficiency of Justice, *Time Management Checklist*, 9 December 2005, https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ%282005%2912&Sector=secDGHL&Language=lanEnglish&Ver=rev&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6

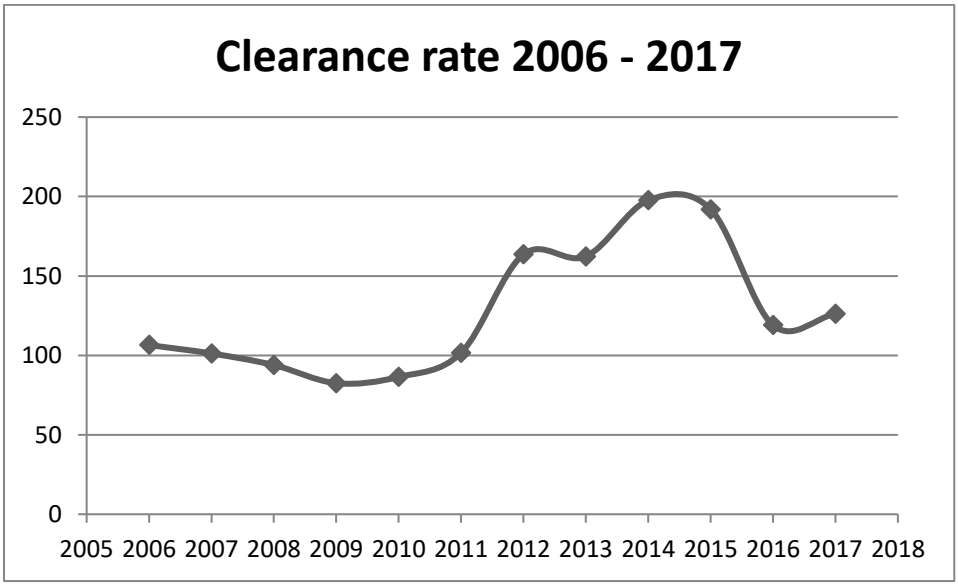
full pilot cases - focus on perspective of the Court (June 2004 - June 2017)" on page 220, it is indicated how much time has passed between the introduction of the first application and the Court's rendering of a judgment. The chart in Annex 4 "VI-a Cases open or closed + level of cooperation of the State (June 2004 - June 2017)" on page 216 shows how long it has taken for a case to be executed or for how long it has already been pending. From the interviews, it will be clear that the Court has indeed set up procedures in order to meet its own requirements. As they are not all publicly available, they have mostly come up during the interviews with the Court's lawyers. Therefore, they will be discussed in-depth in the next sub-chapter.

Additionally, the CEPEJ has developed a compendium of best practices concerning time management of judicial proceedings. The compendium includes information on the setting of time-frames, on dealing with delays, collecting and disseminating data, developing procedural case-management policies and adopting caseload and workload policies.[584] A number of these concepts were focussed on during the interviews with judges and lawyers at the Court as well.

5. Clearance rate

Lastly, the research will look at the clearance rate, which can be defined as the number of outgoing cases as a percentage of the incoming cases. This indicator can determine whether courts are able to keep up with their incoming caseload.[585] The evolution of the Court's clearance rate is shown in the next chart.

III.6 CLEARANCE RATE IN GENERAL 2006-2017



[584] European Commission for the Efficiency of Justice, *Compendium of "best practices" on time management of judicial proceedings*, 8 December 2006, https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ%282006%2913&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6.

[585] P. ALBERS, "Performance indicators and evaluation for judges and courts", CEPEJ, p. 10, http://www.coe.int/t/dghl/cooperation/cepej/events/OnEnParle/MoscowPA250507_en.pdf.

Between 2012 and 2014, the Court disposed of a huge number of cases on its docket. The line going above the percentage line of 100% thus shows that in this time-frame, the number of cases disposed of judicially was considerably bigger than the number of cases allocated to a judicial formation. In 2015, the numbers returned back to normal. In 2017, there is again a small surge in the numbers. This could be due to the *Burmych* judgment, as it enabled the Court to transfer a large number of pending applications to the Committee of Ministers. During the interviews, judges and lawyers were asked about the underlying systems making this possible and whether the pilot judgment procedure played a role.

D. The experience at the side of the Court: is the pilot judgment procedure efficient?

One of the respondents summarized what the pilot judgment procedure was set up to do in terms of efficiency: *"globally speaking, one of the reasons why we have used the pilot judgment procedure is in order to be more efficient, to go more quickly with less time-consuming procedures. That's for sure."*[586] The question remains however, whether the procedure lives up to its goals and which circumstances are needed for it do so.

1. Case-load

The Registry at the European Court is divided in different Sections and each of them has a country from the top 5 violating countries and one from numbers 6-10 under its responsibilities. This system was set up to ensure that the workload would be split up equally among the Sections.[587] At first sight, it would seem that the pilot judgment procedure has a positive impact on the case-load of judges and lawyers working at the Court. As in the majority of cases, similar applications are kept pending and when there is a domestic remedy available for them so they can be sent back, this creates the assumption that it would alleviate their work. One interviewee in Strasbourg clarified that this kind of working enables the Registry to work with many cases at the same time. Consequently, this interviewee concluded that this directly influences the workload in a positive way.[588]

Another interviewee elaborated on the effect of a follow-up decision finding a new domestic remedy to adhere to the criteria of article 13 on the Registry and described it as a magic wand causing all of these cases to disappear. However, this respondent nuanced this by stating that it only referred to cases in which there is only a procedural problem. When there is a broader issue, such as wide-spread problems with respect to prison conditions or with internment of mentally ill prisoners, this will not be solved so swiftly. As long as these general measures are not executed, the pilot judgment procedure will not have meant anything for the Court's backlog.[589] Indeed, as another respondent explains in this context: "*once the pilot is out, it gives you a bit of breath during the time-limit for adjourning. But when the time is over, they come back in. Then friendly settlements are needed to alleviate the load*."[590]

[586] Interview dd 09.01.2017.
[587] Interview dd 23.02.2017.
[588] Interview I dd 20.01.2017.
[589] Interview II 20.01.2017.
[590] Interview II dd 17.01.2017.

However, some respondents emphasized that the pilot judgment procedure as such is a very tough and time-consuming procedure for the Court.[591] The preparation of a pilot case takes a lot of time. First, the lawyers need to go through all the cases stemming from this issue in order to create a good overview of the inflow of cases. Then the lawyers need to identify the different problems resulting from the structural issue.[592] The pilot must be well-prepared and the origin of the problem must be well-defined.[593] Subsequently, the Court needs to decide: do we communicate? If so, do we communicate all of the cases? If not, which one do we communicate? [594] The communication is in reality one of the defining stages in the life of a case, certainly from a case-management point of view. If there is a friendly settlement before the communication, then the parties will settle out of Court which will lead to a strike-out decision. It is only when the case has been communicated, that the Court will render its assistance in order to come to an agreement. If this is successful, then this will count as a friendly settlement. If it is not successful, the Court can still decide for a unilateral declaration. Most importantly, a case which has been communicated must be subsequently dealt with by a Committee or a Chamber, either with a judgment or through a decision declaring it inadmissible. If a case is not yet communicated, it can be found inadmissible through the Single-Judge Procedure. Consequently, when the Court decides to adjourn applications before they are communicated, this decision will have originated from considerations of case-management. These kinds of decisions are purely practical.[595]

Furthermore, even though these similar applications are kept pending, they still require work from the Registry. In the meantime, the Court continues to receive many cases. Even if the Registry decides to not deal with them, the individual lawyers still have work to do because the applicants keep writing.[596]

Similarly, the last stage in the proceedings of follow-up after a pilot case puts work on the plate of the Court. One respondent explained that in order to absorb the backlog created by a specific systemic issue, the Court had to hire one B lawyer and one intern to permanently work on this for more than a year. The pilot judgment procedure is not regarded by this interviewee as a magic solution, because there still has to be follow-up care.[597]

2. Simplicity/complexity

It is important to remember that following Rule 61, pilots are subject to priority treatment.[598] This in principle would categorize them as Chamber cases and thus as complex cases. This only

[591] Interview II dd 20.01.2017.
[592] Interview dd 11.01.2017.
[593] Interview dd 11.01.2017.
[594] Interview II dd 17.01.2017.
[595] Interview II dd 17.01.2017; examples of cases in which the Court decided to adjourn non-communicated cases can be found in the continuum of pilot and pilot-like cases on page 32; this adjourning before communication is what has been termed 'unofficial adjourning' above. This is something that is done also outside of the scope of the pilot judgment procedure. However, once cases are communicated, they can only officially be adjourned in the context of a pilot case.
[596] Interview III dd 13.01.2017.
[597] Interview dd 09.01.2017.
[598] Rule 61.2 c) Rules of Court.

counts for the original pilot case. Cases coming after that would be dealt with by a Committee under the WECL procedure, or by a Single Judge after the finding by the Court of an effective domestic remedy. These would thus be regarded as simple cases.

However, this does not reveal the simplicity or complexity of the underlying issue. This is important from an efficiency viewpoint as a complex case would require more work from the Registry. The question whether pilot cases are simple or complex cases was not unambiguously answered by the respondents in Strasbourg. Some respondents agreed that the application of the pilot procedure has nothing to do with the simplicity or complexity of the issue.[599]

On the other hand, some respondents emphasized that pilot cases have raised complex legal issues with respect to the right to property, the right to fair trial and the prohibition of torture.[600] One interviewee differentiated between the different pilot cases involving the right to property. The problem in *Broniowski* was simple, it merely required the State to have new legislation which would ensure compensation in accordance with the promises made and the Convention. The problem in *Hutten-Czapska* was more complex. It concerned an issue of rent control where the owners complained that their right to property was infringed because the amount of rent they could ask from their tenants was controlled by the State. This issue is much more complicated because it also involves the rights of the third parties, the tenants. Solving this not only required a lot of money but also a thorough reform of the rent control system and even the housing situation in Poland. [601]

Nonetheless, as stated above, even if the issue in the original pilot case is a simple one, the pilot procedure still is tough and time-consuming for the lawyers and judges working on the case.

3. Productivity

Strike-out or inadmissibility decisions as a result of new effective domestic remedies following a pilot case are the main factors which increase productivity in the context of repetitive cases. The number of hours worked on a pilot case is proportionately more productive than in individual cases, if this group of similar applications is equally dealt with in one go.[602] Indeed, when the Registry is able to quickly do away with a bulk of cases, this is sure to increase productivity numbers overall. One respondent explains that this was quite easy with *Broniowski* and *Hutten-Czapska* because the whole issue can be solved with compensation[603], so that productivity with these cases was quite good. It gets more complicated with article 3 cases concerning sub-standard prison conditions. It is not as easy if the State is required to address prison policy or build new prions. It thus depends on the measure that is required from the State

[599] Interview I dd 13.01.2017; Interview anonymous I; Interview II dd 16.01.2017; Interview dd 9.01.2017; Interview anonymous I.
[600] Interview I dd 13.01.2017; Interview II dd 13.01.2017
[601] Interview I dd 16.01.2017.
[602] Interview dd 11.01.2017.
[603] This is contrary to what another respondent stated that the measures required in Hutten-Czapska were more complex than in Broniowski.

in execution of the pilot.[604] Follow-up to cases concerning detention issues is further difficult to base on one judgment because not all facts are the same.[605]

Another respondent referred to the decision of *Łatak v. Poland*, which declared the follow-up applications after the quasi-pilot case of *Orchowski v. Poland* inadmissible for non-exhaustion of a new domestic remedy created as a result of this quasi-pilot.[606] This bulk of follow-up cases consisted of 271 pending applications.[607] This is just one example of how a successful pilot influences the Court's productivity positively. As explained above,[608] it has become standard practice for the Court to evaluate the appropriateness of domestic remedies set up after a pilot judgment, resulting subsequently in inadmissibility decisions in the pending similar applications.[609]

4. Length of proceedings

a. Overall positive evaluations

The evaluation of the pilot judgment procedure in terms of speediness was almost unanimously positive with the interviewees in Strasbourg.

With respect to the pilot case, respondents inferred that due to the priority treatment for the pilot case, these would naturally be handled quicker than a standard individual case.[610] This is naturally true if the issue involves the right to property or the right to a fair trial as these articles don't normally call for priority treatment.[611]

With respect to the follow-up cases, most respondents added some criteria for the procedure to be speedy. From the viewpoint of the Court, it was stated that when the pilot has lead to the creation of effective domestic remedies so that pending cases can be sent back, the procedure was quicker, compared to the situation where these cases would have been dealt with one by one.[612] This again thus depends on the level of cooperation of the involved State in the willingness to create a domestic remedy which is retroactively applicable. One respondent stated that the number of pending cases, the nature of pending cases and the nature of the general measures required also plays a role, although the cooperation of the State is the main criterion.[613]

Another respondent explained that these frozen cases would be in the backlog anyway. The involvement of the pilot judgment procedure at least creates a guarantee for the applicants that

[604] Interview anonymous I.
[605] Interview II dd 17.01.2017.
[606] ECtHR decision, *Łatak v. Poland*, application no. 52070/08, 12 October 2010.
[607] Interview II dd 17.01.2017.
[608] This point was discussed under "The complementary nature of the relationship between the Committee of Ministers and the Court" starting from page 87.
[609] In order to see which cases have already been closed by the Court with such a follow-up decisions, see Annex 4 "VI-a Cases open or closed + level of cooperation of the State (June 2004 - June 2017)" on page 215.
[610] Interview II dd 17.01.2017; Interview anonymous I.
[611] European Court of Human Rights, *The Court's Priority Policy*, http://www.echr.coe.int/Documents/Priority_policy_ENG.pdf.
[612] Interview II dd 13.01.2017.
[613] Interview dd 09.01.2017.

the Court would work together with the State in order to solve the issue. In this way, the problem will be solved quicker and more thoroughly overall.[614]

Even if the follow-up cases are not sent back, because either the established domestic remedy does not have retroactive effect in the national system or the implementation of general measures does not run smoothly at all, being able to apply the recipe thought out in the pilot case to a group of similar cases in a WECL procedure will lead to quicker solutions as well. One respondent used the *Ananyev* case to exemplify this point. In the case, the Court explained it's view that prison overcrowding was being caused by excessive use of pre-trial detention, which should be an exceptional measure. The Court here offered a recipe for the State to solve the underlying issue, as well as a recipe for itself to quickly deal with follow-up cases through the WECL procedure. The Court can simply refer to its findings in the pilot case and argue that there is no need to depart from those finding. This is procedurally quicker than having to elaborately argue the same point over and over. [615] In practice, there is one Registry lawyer who routinely works on these specific cases after the pilot judgment. Because this lawyer does not need to elaborate much on the merits or the procedural issues, these cases can be dealt with quickly afterwards. [616]

Some respondents here also mention the implications of this procedure for the applicants of the similar cases that were not picked as the pilot. Even though these repetitive applications are dealt with quicker for the Court following a pilot, this does not necessarily mean that these applicants are offered a solution in a shorter time-frame.[617] This issue will however be discussed in the next Chapter concerning access to justice.

b. Time management at the Court

The Court has internal guidelines concerning time-frames for processing cases. It is important to remark that these are guidelines, they are not binding.[618] The timing of cases depends on various elements: the actual possibility of dealing with the case within the Registry, the prospects of compliance by the State, the prospects of a friendly settlement procedure and so on.[619] In a WECL case however, the Court generally aims to render a judgment within 8 to 9 months following the introduction of the first letter.[620]

Priority cases are closely watched.[621] It is however difficult to have fixed time-limits for these priority cases because the speed with which they are dealt with depends on a lot of factors. If the lawyer requests more information, this could take more time. Additional procedural issues could also add more time. There is however a guarantee behind officially recognizing the priority treatment of cases. Every lawyer in the division is working on the case and it is closely watched. There is an internal system of attaching warnings to it in the database. Further,

[614] Interview I dd 20.01.2017.
[615] Interview III dd 13.01.2017; this same point was made in Interview dd 19.01.2017.
[616] Interview II dd 16.01.2017.
[617] Interview II dd 13.01.2017; Interview anonymous I
[618] Interview anonymous I.
[619] Interview II dd 17.01.2017.
[620] Interview III 13.01.2017.
[621] Interview dd 11.01.2017.

progress in the case is discussed during meetings. One respondent clarified that it's more an internal control system that is attached to the case, rather than an official deadline.[622]

Another respondent subsequently elaborated a bit about the Court's management of delays. Delays occur mostly in the stock-taking, meaning in the identification of cases. The Court further has developed some strategies as to how to tackle delays: management of the archives, a clearer identification of cases based on the new Rule 47[623], the strategies developed concerning the Brighton backlog[624], and the system where a red flag is put up with a case if it has not been handled within the set deadline. According to this interviewee, the Court is now pretty much in control of delays.[625]

5. Clearance rate

a. Role of the Single Judge and the WECL procedures

During the Strasbourg interviews, respondents were asked about this increase in clearance rate, especially between 2012 and 2014. This question was specifically designed to know whether the pilot judgment procedure played a role in this, and thus whether the procedure fulfils its role of increasing the Court's efficiency.

A considerable group of respondents shared the view that the pilot judgment did not really do much in reducing the Court's backlog. This was mainly due to the Single Judge procedure.[626] According to some interviewees this rise in the clearance rate was also the result of the new competence of the Committees of Three Judges, meaning the WECL procedure. One respondent explained that these two measures allowed the Court to get rid of about 90 000 cases. This affected the workload of course, the Court did a tremendous amount of work in 2012-2013 in order to get rid of the Brighton backlog. Interestingly, this respondent stated in this context: *"I think for many cases, we closed both eyes but we got rid of it."*[627]

Some interviewees however made it clear that this increase in the Court's clearance rate was due to a combination of different factors, depending on the kinds of cases. Among the meritorious cases, one respondent explained that the following techniques contributed : recourse to pilot and WECL procedures, simplified communications, recourse to friendly settlements and unilateral declarations, the use of the Uzun formula[628] and task force management of lawyers. Among inadmissible cases, the interviewee stated the decrease of the

[622] Interview I dd 20.01.2017.
[623] Rule 47 has created a uniform system for submitting a first application to the Court. This has enabled the lawyers to work quicker in this stage of a case.
[624] These strategies will be discussed in the next sub-part concerning Clearance rate.
[625] Interview II dd 17.01.2017.
[626] Interview I dd 13.01.2017; Interview II dd 13.01.2017; Interview I dd 18.01.2017.
[627] Interview anonymous I;
[628] This formula means that when an applicant makes claims based on several substantive provisions of the Convention, the Court will address the main complaint and find that it is not necessary anymore to address the others. For instance, when an applicant complains both on the basis of article 6 that there was no access to a court and on article 13 that there was no effective remedy, the Court can decide to use the Uzun formula and only address the claim based on article 6.

Court's caseload and backlog was due to the Single Judge Procedure and the strict application of the new Rule 47[629] which created a uniform application mechanism.[630]

b. The role of the pilot judgment procedure in the past

A group of respondents on the other hand stated that the pilot judgment procedure did have its role to play in the reduction of the backlog. They mostly link the pilot judgment procedure then to the WECL procedure. There is first a message from the Court in the form of a pilot case, as a result of which these follow-up cases can be easily solved following this fast-track procedure. The one does not exist without the other and that is the merit of the pilot procedure, according to these respondents.[631] One respondent explained that the idea of bringing the pilot judgment procedure as a working method to the Chambers as well was of crucial importance to deal with repetitive cases. Since then, this interviewee explained that the Court was able to not only focus on the pilot procedure but also on the execution of pilot cases.[632] The first two pilots were rendered by the Grand Chamber. From 2009 on, with the case of *Burdov (no.2) v. Russia*, the Chambers also started to use the procedure.[633]

Others agreed with this but did however nuanced this claim. The pilot judgment was indeed a strategy in this context and did indeed do something for the increase in the Court's clearance rate but the big bulks of cases did go through the previously mentioned Single Judge decisions.[634]

c. The role of the pilot judgment procedure in the future

Meanwhile, the importance of these Single Judge decisions for the reduction of the backlog has decreased. As some respondents explained, Single Judges have done away with a huge part of pending inadmissible applications. However, they do not deal with the meritorious cases. And these cases are of course the most time-consuming for the Court to deal with. There has been an evolution in the composition of the Court's backlog, leaving a large group of meritorious cases which will present a new challenge to the Court.[635] One respondent explained that for this new challenge, the Court it trying to put new working methods in place. Grouping cases is part of that, whether in a pilot or not. [636]

There is a new wave of connected cases being brought to the Court which is increasing the Court's caseload again.[637] A portion of this influx is due to the Turkey coup, which will present a new challenge to the Court. The Turkish government dismissed almost 100.000 people, including judges, prosecutors, civil servants, police officers, army officers, etc. These people

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[629] Rule 47 now contains a detailed uniform application form and has created the rule that the Court will not examine the case if the application is not submitted in the form and manner as required by it.
[630] Interview II dd 17.01.2017.
[631] Interview I dd 20.01.2017; Interview II dd 18.01.2017; Interview II dd 16.01.2017; Interview dd 09.01.2017.
[632] Interview dd 12.01.2017.
[633] See Annex 6 "VI-c Detailed overview of full pilot cases - efficiency factors (June 2004 - June 2017)" starting from page 222.
[634] Interview II dd 13.01.2017; Interview anonymous I.
[635] Interview II dd 13.01.2017; Interview anonymous I; Interview 19.01.2017
[636] Interview I dd 18.01.2017.
[637] The rise in numbers can be seen in "III.1 Caseload of the ECtHR as a whole 2006-2017" on page 114.

have now turned to the Court and within a few months' time, the Court received six thousand applicants. At the time of the interviews – January 2017 – the Court was receiving three hundred to five hundred applications per day. This is however nothing compared to what is pending before the Turkish Constitutional Court. At the time of the interviews, one interviewee was told that they were approaching the figure of 100 000 cases. One respondent explained how the pilot judgment procedure could play a role here. These cases are repetitive and if the problem is not dealt with, the Court might have to introduce a pilot judgment to deal with the problem.[638] The Court would have to identify some categories in which the underlying issue finds effect, and then decide on one or a combination of cases within that category. The Court further received a large group of incoming applications from Hungary and Romania which were again bringing up the question of prison overcrowding. These problems again look like systemic issues and thus this respondent expected new pilots in these situations.[639]

Another technique which was developed in order to stay up to date with the incoming cases is called "one in, one out", a technique which is relevant concerning cases which can be eliminated quickly, meaning unmeritorious cases or WECL cases. One interviewee explained this process and its context. After the drop in backlog caused by the Single Judge procedure after 2011, the Court still had a mere 5000 of these unmeritorious cases pending. This was deemed a normal physiological backlog for this kind of cases. This respondent stated that this was due to the 'one in, one out' technique meaning that when a lawyer is seized with a new case, he or she has a very limited period of time to deal with it. The lawyer is further not allowed to pass to the next one before the previous case is finished. So normally, there is a solution in hours. The maximum is one week. This respondent stated that this is the real panacea in order to reduce the numbers.[640]

What is however not under control is the Chamber – or meritorious non-repetitive cases. The Court has a number of these cases which also do not fall under priority treatment within the Court's categorization. Issues involving freedom of speech, the right to private life and freedom of assembly for instance fall within this category.[641] Some of these however had been introduced more than ten years ago but have not yet been decided on. This is not a satisfactory situation. [642] This point has come up during the interviews a few times. Some of the respondents raise the issue that due to the fact that pilots are granted priority treatment, other cases which are lower on the priority scale but still present important human right issue don't get solved. The prioritization of the cases means that the Court starts with the core articles: article 2, 3 and 5§1 ECHR. Vulnerability is also a factor which puts a case higher in the picking order. In that sense, issues like length of proceedings was very low in the priority listing but due to the fact that this was a systemic issue in a lot of countries, it came to the forefront as a series of pilot cases.[643] These meritorious but less-prioritized cases remain in the backlog of the Court. As

[638] Interview III dd 13.01.2017.
[639] Interview dd 19.01.2017.
[640] Interview dd 19.01.2017.
[641] Interview II dd 18.01.2017.
[642] Interview dd 19.01.2017.
[643] Interview II dd 20.01.2017.

another respondent posed it: pilot judgments are "*taking from Peter to give to Paul*"[644], meaning that they are using a lot of the Court's resources while leaving applicants in other individual but equally important cases in the cold. Efficient processing of pilot cases is thus not only a matter for the victims involved in these large-scale human rights issues but is equally of importance to all applicants trying to access the Court.

6. The shadow side of efficiency: attraction of new cases due to the pilot procedure

Some respondents in Strasbourg pointed towards a perverse effect of the projected efficiency of the pilot judgment procedure. In some cases, the application of the procedure seems to have created an even bigger influx of cases with respect to the same issue. One of the respondents explains this in the context of the case of *Yuriy Nikolaeyivic Ivanov v. Ukraine*. The Court had first adjourned the examination of similar pending cases but had warned Ukraine that it would have to re-open them if the State did not address the issue. As sadly expected, Ukraine did indeed not execute the judgment, and so the Court re-opened examination. In 2013, it rendered judgment in 3000 cases and communicated 3000 others. It further introduced a simplified procedure whereby the Court ordered the State to set up domestic remedies and to pay each applicant 2000€ for non-pecuniary damage. By doing so, this section disposed of ten years backlog. However, the result was that the Court arguably became part of the Ukrainian enforcement system. An increasing number of similar cases were being introduced to the Court. This respondent stated in this context that there lawyers who made their business of bringing such claims to the Court. The 2000€ for non-pecuniary damage became an incentive for thousands to come to the Court. Consequently, in 2015, the Court received between 1500 and 2000 cases per month, leading again to a crisis for the Court's backlog. As a result, this interviewee concluded that "*sometimes, being efficient, too efficient is also problematic.*"[645]

With respect to the *Varga v. Hungary* case, it is a well-known fact within the Court that the case backfired in terms of efficiency.[646] Originally, this case was used mainly as a case-management tool.[647] However, at first instance, the Court had not decided to adjourn the similar pending cases. At that time, there were merely 90 such cases pending at the Court. Only afterwards did it do so because it was being flooded by new cases. At the moment of the interviews in Strasbourg – January 2017 – the Court had more than 7000 of those cases. [648]

This shadow side is thus very much linked to a lack of cooperation from the State to solve the underlying issue.[649] The *Ivanov* case shows that there is a case to be made for the argument that there is no real use in rendering a pilot judgment where there simply is no domestic remedy available and the State is not willing to create one. If this is the case, the Court is the only refuge for a large number of affected persons at home and this could create a draw towards the Court. This is what one respondent elaborated on by stating that pilot judgments are not intrinsically

[644] Interview anonymous II.
[645] Interview III dd 13.01.2017.
[646] Interview III dd 13.01.2017;
[647] Interview anonymous III.
[648] Interview II dd 16.01.2017
[649] Interview anonymous III.

linked to human rights violations. They are however applicable to rule of law issues. All of these cases concerning the non-enforcement of domestic proceedings are de-naturalizing the role of the Court:

> *"[T]his shows that there is a fundamental European human rights rule of law issue, that States are not getting the message. […] And this of course created a huge pressure on the Court. We deal with repetitive violations which are clear from the legal point of view. They are clear. Maria Athanasiou, Manushaqe Puto, they shouldn't have been coming at all before the Court."*[650]

Cooperation in general is an important parameter in order to achieve an efficient handling of a pilot case. This is a point which has come up in multiple interviews[651]:

> *"If the government does not agree, we should have to reconsider it. Because when we don't have the cooperation of the government, it is most probable that the whole procedure will be of no avail. It's going to fail."*[652]

E. Conclusion: is the Pilot Judgment Procedure efficient?

From a combination of the statistical data provided by the Court and the empirical data collected in the context of this doctoral research, it can be concluded that overall the pilot judgment procedure is capable of being efficient. There are however a number of conditions to this.

1. Case-load

As to case-load, the evaluation both based on the statistics, as well as on the empirical data is positive. The pilot judgment procedure enables striking out a lot of cases at the same time. There are however a few nuances to this claim.

Firstly, strike-outs can only take place when the underlying systemic issue is procedural in nature and can thus easily be solved through the creation of a domestic remedy with retroactive applicability. In the situation that complex measures are needed, the pilot only creates breathing room until the time-limit for the adjournment is over.

Secondly, the pilot judgment procedure is a tough procedure for the Registry. It requires a lot of preparatory and follow-up work, more than in a standard individual case.

Thirdly, the incoming cases create additional work for the Registry, even if the Court decided to adjourn them. Lawyers do the stock-taking of the cases, communicate with these applicants and so on.

2. Simplicity/complexity

The interviews in Strasbourg clarified that the simplicity or complexity of cases is not a factor taken into account when deciding to apply the pilot judgment procedure. The procedure does

[650] Interview I dd 18.01.2017.
[651] Interview anonymous III; Interview I dd 18.01.2017; Interview II dd 18.01.2017; Interview II dd 20.01.2017; Interview dd 09.01.2017.
[652] Interview dd 09.01.2017.

not focus on one or the other. This is also reflected in the kinds of issues that the pilot judgment procedure has dealt with: going from a legally simple issue such as compensation for loss of property in Broniowski, to a more complex issue concerning statelessness in Kuric. The fact that these complex issues require more work from the Court however is clear.

3. Productivity

Similarly as with the caseload criterion, the pilot judgment procedure seems to be positive for the productivity of the Court compared to dealing with these cases in an individual manner under the condition that the group of similar cases is dealt with in one go. This in turn depends on the kind of measures required from the State. If this is merely compensation, the pilot will certainly lead to more productivity. If the required measures are more complex, this creates more work for the Registry. Furthermore, when the case concerns sub-standard prison conditions, the follow-up cases might differ considerably as to the facts, requiring a different approach.

4. Length of proceedings

Overall, there is a positive evaluation of the pilot judgment procedure in terms of length of proceedings as well. With respect to the pilot case which is afforded priority treatment, there is no doubt that these cases are dealt with quicker than if they would have been entertained individually. Priority treatment causes pilots to be closely watched through an internal control system.

With respect to the follow-up cases, there are again some additional criteria. For those follow-up cases to be quickly dealt with by the Court it is necessary that the State creates a domestic remedy which is retroactively available so that they can be sent back. This again requires the cooperation of the State in addressing the issue. The number of pending cases, the nature of pending cases and the nature of the required measure are also factors which influence the length of procedure. It must be remarked that this means that these cases go quicker for the Court. This does not mean that the solution is found quicker for the applicants.

Even when these cases are not going quicker, under individual treatment they would be in de backlog. The pilot judgment procedure however still creates a dual advantage. Firstly, the procedure brings them under priority treatment, while their subject matter might have caused them to drop down to the back of the priority list under individual treatment. Secondly, the pilot judgment procedure creates a guarantee that the Court and the State are working together to solve the underlying issue.

5. Clearance rate

The rise in clearance rate between 2012 and 2014 was due to the Single Judge procedure, in combination with the WECL procedure. This was made clear both on the basis of the statistics as well as the empirical data. The Single Judge procedure is however geared towards unmeritorious cases, while the pilot judgment procedure focusses on a wholly different category of cases. In the past, the pilot procedure does seem to have played its part with respect to meritorious cases, in combination with the WECL procedure for the follow-up cases.

The backlog now however consists less and less out of Single Judge cases. There are now more meritorious cases, consisting for a large part out of Chamber cases – meaning meritorious and complex cases. Due to the priority treatment of the pilot procedure, a lot of these cases have not yet been dealt, termed by one of the respondents as taking from Peter to give to Paul. The Court however is developing new working methods, including grouping of cases in pilots or outside of the pilot judgment procedure.

6. Shadow side of pilots

The interviews however revealed that the pilot procedure could have a perverse effect. The Court might become part of the domestic enforcement system, causing it to be flooded with similar applications. Awarding sums of just satisfaction has an attractive effect towards Strasbourg. Seeing that this happens quite easily after a pilot case because the substantive arguments have already been made in the pilot case, this creates an incentive to go to the Court.

IV. Access to justice – looking at the pilot judgment procedure from the perspective of the applicants, through the eyes of lawyers and NGO's.

As one author explains: *"[f]rom the perspective of the individual applicant, the whole complicacy of the pilot judgment procedure becomes particularly apparent*."[653] Objections from the perspective of applicants have been raised in some follow-up decisions concerning their right to compensation.[654] Additionally, it has been argued that the applicants in the cases which are kept pending, are being hindered in their right to access to the Court.[655] Ironically, it is this possibility for adjournment that has been labelled as the central element of the pilot judgment procedure aimed at alleviating the Court's overburdened docket.[656] These adjourned cases will be done away with by the Court using one of the enumerated procedures. As Gerards and Glas state: "no matter the method of disposal, no individual access is given to the Court."[657]

The Evaluation Group to the Committee of Ministers during the reforms in 2001 already cautioned that an increased attention for productivity entails the risk for the applicants that they will not reach the Court or that they will not receive sufficient collective consideration of their case. This in turn would then negatively affect the credibility and authority of the Court.[658] In the Explanatory report to Protocol 14, the right to individual application furthermore remained to be considered as one of the principal and unique features of the European Human Rights system, an element which could not be altered.[659] The pilot judgment procedure however, shifts the focus of the Court on the general issue rather than on the individual applicants.

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[653] M. FYRNYS, "Expanding Competences by Judicial Lawmaking: the Pilot Judgment Procedure of the European Court of Human Rights" in A. VON BOGDANDY, I. VENZKE, *International Judicial Lawmaking – On Public Authority and Democratic Legitimation in Global Governance*, Springer, 2012, 361.

[654] For instance in ECtHR, decision, *Stella and others v. Italy*, application no. 49169/09, 16 September 2014, §§ 56-63; and ECtHR decision, *Andrzej Wolkenberg and others v. Poland*, application no. 50003/99, 4 December 2007, § 26.

[655] A. BUYSE, " The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges", *Nomiko Vima (Greek Law Journal): European Court of Human Rights - 50 Years*, 2010, 90; J.H. GERARDS, L. R. GLAS, "Access to justice in the European Convention on Human Rights system", *Netherlands Quaterly of Human Rights*, 2017, Vol. 35(1), 27; DI MARCO, A., "L'état face aux arrêts pilotes de la Cour européenne des droits de l'homme ", 108 *Revue Trimesterielle des droits de l'Homme*, 2016, 903; A. BUYSE, "Flying or landing? The pilot judgment procedure in the changing European human rights architecture" in O.M. ARNARDÓTTIR, A. BUYSE, *Shifting Centres of Gravity in Human Rights Protection. Rethinking relations between the ECHR, EU , and national legal orders*, Routledge, 2016, 106; M. FYRNYS, "Expanding Competences by Judicial Lawmaking: the Pilot Judgment Procedure of the European Court of Human Rights" in A. VON BOGDANDY, I. VENZKE, *International Judicial Lawmaking – On Public Authority and Democratic Legitimation in Global Governance*, Springer, 2012, 361.

[656] M. FYRNYS, "Expanding Competences by Judicial Lawmaking: the Pilot Judgment Procedure of the European Court of Human Rights" in A. VON BOGDANDY, I. VENZKE, *International Judicial Lawmaking – On Public Authority and Democratic Legitimation in Global Governance*, Springer, 2012, 361.

[657] J.H. GERARDS, L. R. GLAS, "Access to justice in the European Convention on Human Rights system", *Netherlands Quaterly of Human Rights*, 2017, Vol. 35(1), 27.

[658] Committee of Ministers Evaluation Group, *Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights*, EG Court(2001)1, 27 September 2001, 31.

[659] Council of Europe, *Explanatory Report to Protocol 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention*, Council of Europe Treaty Series – No. 194, 13 May 2004, §. 10.

In the context of the pilot judgment procedure, the Court has taken the interests of the applicants into account, especially regarding the applicants' and all other victims' right to speedy redress[660]:

> *"The object of that procedure is, on the one hand, to reduce the threat to the effective functioning of the Convention system deriving from repetitive cases that originate in systemic problems and, on the other, to facilitate the most speedy and effective resolution of a systemic dysfunction affecting the protection of Convention rights in the national legal order. By incorporating into the process of execution of the pilot judgment the interests of all other existing or potential victims of the systemic violation identified, the procedure aims to afford redress to all actual and potential victims of that dysfunction, as well as to the particular applicant in the pilot case."*[661]

Critique has however been voiced from the perspective of the applicants against the pilot judgment procedure.[662] Fairly early on, the fear that the use of the pilot judgment procedure could be detrimental to the applicants involved was even voiced by the Committee of Ministers as well:

> *"In certain circumstances, it may be preferable to leave the cases to the examination of the Court, particularly to avoid compelling the applicant to bear the further burden of having once again to exhaust domestic remedies, which, moreover, would not be in place until the adoption of legislative changes."*[663]

These perspectives all express an assumption that the pilot procedure will negatively affect the right to individual application of the applicants involved in these cases. The question thus arises what the impact in reality is of this shifted focus on the rights of the applicants, particularly concerning their right to individual application. This question will be the focus of this chapter.

To this end, this chapter will first sketch the general concept of what access to justice is. This right was not originally included in the major human rights instruments such as the Universal Declaration of Human Rights (UDHR), the International Convention on Civil and Political Rights (ICCPR) or the European Convention on Human Rights (ECHR). Furthermore, the right of access to justice is an umbrella right, existing of "both a process and a goal"[664], making it possible for individuals to enforce other fundamental rights. Consequently, it is important to firstly demarcate the right of access to justice from a doctrinal point of view, in order to understand what it precisely entails (A.). Secondly, this chapter will explain how the Council

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[660] The need to offer speedy redress was also mentioned in the cases of Burdov (no. 2) v. Russia and Ananyev v. Russia.

[661] ECtHR decision, *Załuska and Rogalska v. Poland*, application nos. 53491/10 and 72286/10, 20 June 2017, § 29.

[662] A. BUYSE, " The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges", *Nomiko Vima (Greek Law Journal): European Court of Human Rights - 50 Years*, 2010, 90; DI MARCO, A., "L'état face aux arrêts pilotes de la Cour européenne des droits de l'homme ", *108 Revue Trimesterielle des droits de l'Homme*, 2016, 903

[663] Committee of Ministers, *Appendix to Recommendation on the improvement of domestic remedies*, REC(2004)6, 12 May 2004.

[664] European Union Agency for Fundamental Rights, *Handbook on European law relating to access to justice*, 2016, 16.

of Europe itself views the right of access to justice. The discussion will entail both the Court's case law based on article 6 of the Convention, as well as with respect to its right of individual application as laid down in article 34 of the Convention. It will further encompass the views of other Council of Europe bodies (B.). Thirdly, the use of the terminology of access to justice in this dissertation will be further explained. From the sources in the first two sub-parts of this chapter, the normative goal of access to justice is split up in certain operationalized parameters. These parameters are clarified in this third sub-chapter (C.). In a fourth part, the question whether the pilot judgment procedure affects the actual and potential applicants' right to access to justice will be answered based on the experiences of the interviewees (D.). A fifth sub-chapter will elaborate on the role of human rights NGO's in ensuring access to justice, as the research revealed that these organizations do play a part (E.). This chapter will then end with a conclusion in which the question will be answered whether the pilot judgment procedure hinders the right to access to justice (F.).

A. The human rights framework of access to justice.

It is not entirely clear what the right to access to justice precisely entails. Access to justice was not explicitly framed and recognized as a right of itself in the ECHR, nor was it mentioned in the early international human rights documents such as the UDHR and the ICCPR.[665] Only in 2006, was it for the first time included in an international human rights treaty with the adoption of the UN Convention on the Rights of Persons with Disabilities.[666] Classically, the early human rights treaties – including the European Convention on Human Rights - only contain provisions on the right to a fair trial and the right to an effective remedy.[667] In general, the right of access to justice is then linked to these rights whereby it is conceived as an umbrella term, encompassing "sub-rights" in the context of the right to a fair trial and the right to an effective remedy.[668] However, what this umbrella specifically encompasses is not always clear. The following sources have provided clear guidance in this respect: Francioni, the Fundamental Rights Agency of the European Union, Cançado Trindade, the International Bar Association and Gerards & Glas.

Francioni has edited one of the most comprehensive books dedicated to the topic of access to justice. In this work, he has explained that access to justice encompasses a number of different aspects, depending on the preferred interpretation:

> *"[i]n a general manner it (meaning access to justice) is employed to signify the possibility for the individual to bring a claim before a court and have a court adjudicate it. In a more qualified meaning access to justice is used to signify the right of an individual not only to enter a court of law, but to have his or her case heard and*

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[665] European Union Agency for Fundamental Rights, *Access to Justice in Europe: an overview of challenges and opportunities*, 2010, 14.
[666] J.H. GERARDS, L. R. GLAS, "Access to justice in the European Convention on Human Rights system", *Netherlands Quaterly of Human Rights*, 2017, Vol. 35(1), 13.
[667] European Union Agency for Fundamental Rights, *Access to Justice in Europe: an overview of challenges and opportunities*, 2010, 14-15.
[668] European Union Agency for Fundamental Rights, *Access to Justice in Europe: an overview of challenges and opportunities*, 2010, 15-17,

> *adjudicated in accordance with substantive standards of fairness and justice. […] Finally, in a narrower sense, access to justice can be used to describe the legal aid for the needy, in the absence of which judicial remedies would be available only to those who dispose of the financial resources necessary to meet the, often prohibitive, cost of lawyers and the administration of justice."*[669]

The Fundamental Rights Agency of the European Union further has published a handbook on access to justice, shedding light on the issue from both the Council of Europe as well as European Union law standards. The handbook focusses on the right to a fair trial and the right to an effective remedy, as protected under the ECHR and the EU Charter of Fundamental Rights. From this, it distinguishes the following key points encompassed by the right to access to justice: 1) a fair and public hearing before an independent and impartial tribunal; 2) access to legal aid, the right to be advised, defended and represented; 3) the right to an effective remedy and; 4) having a decision rendered in a reasonable time.[670]

Similarly, Cançado Trindade further explains that the right of access to justice not only entails the right to start a procedure before courts or tribunals, but also the guarantees of due process of law and protection through faithful compliance with the judgment afterwards. In particular, he stresses the close relationship between access to justice and due process guarantees.[671]

Lastly, the International Bar Association has issued a report on barriers and solutions concerning international access to justice, based on a number of surveys taken from legal professionals.[672] The report adopts a broad conception of access to justice to cover different stages of the justice process. It covers the existence of rights laid down in laws and with awareness concerning them. It further looks at both formal and informal dispute resolution mechanisms as part of justice institutions. The report also includes questions of access to counsel and representation and encompasses the ability of justice systems to provide fair, impartial and enforceable solutions.[673] The survey that was the basis for this report, questioned legal professionals on the right to access to justice divided in seven sections, including questions on the legal framework and awareness of rights, access to legal advice and representation, access to dispute resolution in civil and criminal matters, due process and fair procedures, the judiciary, the enforceability of decisions and lastly questions about barriers to access to justice and ways to change those.[674] From this survey, three groups of barriers were identified. First, societal and cultural barriers presented itself. This includes literacy, education, poverty and

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[669] F. FRANCIONI, "The Rights of Access to Justice under Customary Law" in F. FRANCIONI (ed.), *Access to Justice as a Human Right*, OUP, 2007, 1.
[670] European Union Agency for Fundamental Rights (FRA), *Handbook on European law relating to access to justice*, 2016.
[671] A. CANÇADO TRINDADE, *The Access of Individuals to International Justice*, OUP, 2011, 71-72.
[672] International Bar Association, *International Access to Justice: Barriers and Solutions*, 2014, http://www.ibanet.org/Document/Default.aspx?DocumentUid=7FCF610E-BEA8-4E06-99B1-B89C34A87BCD
[673] International Bar Association, *International Access to Justice: Barriers and Solutions*, 2014, p. 5, http://www.ibanet.org/Document/Default.aspx?DocumentUid=7FCF610E-BEA8-4E06-99B1-B89C34A87BCD
[674] International Bar Association, *International Access to Justice: Barriers and Solutions*, 2014, p. 11, http://www.ibanet.org/Document/Default.aspx?DocumentUid=7FCF610E-BEA8-4E06-99B1-B89C34A87BCD

discrimination.[675] Second, the survey uncovered a number of institutional barriers, such as insufficient governmental resources to guarantee access, inadequate organizational structure of justice institutions, limited legal assistance and representation, and the lack of enforcement.[676] Lastly, the previous groups of barriers can also intersect. These intersectional barriers include a lack of trust in the justice system and corruption.[677] This study includes the same focus points as the European Commission for the Efficiency of Justice (CEPEJ) study[678] but accounts also for the possibility that there are other hurdles that were not thought of. In this sense, it casts a wider net in assessing problems posed to the exercise of the right to access by applicants than the CEPEJ study.

All of these sources thus seem to agree that the right of access does not merely entail the possibility to institute proceedings. The right of access to justice can be called a gateway right. It is only when there is access that applicants are able to enforce other fundamental rights through courts and tribunals.[679] Consequently, it is of primordial importance in any justice system, including at the European Court of Human Rights. [680] The right of access to justice is thus in reality an umbrella right, which encompasses several distinct sub-rights. Gerards and Glas have summarized this wide approach by dividing the concept of access to justice in its procedural branch and a substantive prong. The narrow procedural approach terms the notion of access to justice as merely providing an opportunity to use a procedure before a court or other judicial body. Substantive access to justice also focusses on just outcomes and questions whether procedures help realize material justice. This cannot be done without looking at due process standards and procedural justice.[681] This thesis takes into account this second interpretation of access to justice and looks at access to justice with a similar wide approach towards the concept of accessibility. In order to further put the right to access to justice in context, the following sub-chapter will discuss how the Council of Europe conceptualizes access to justice.

B. How does the Council of Europe see the right to access to justice?

Within the Council of Europe, there are several bodies that have developed standards and working instruments concerning the concept of access to justice. Firstly, the viewpoint of the Court itself will be assessed. The Court's perspective will be examined both based on its jurisprudence with respect to the right to a fair trial and to an effective remedy, as well as based on its contentieux concerning the right to individual petition which ensures access to

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[675] International Bar Association, *International Access to Justice: Barriers and Solutions*, 2014, p. 5 & 14-20, http://www.ibanet.org/Document/Default.aspx?DocumentUid=7FCF610E-BEA8-4E06-99B1-B89C34A87BCD
[676] International Bar Association, *International Access to Justice: Barriers and Solutions*, 2014, p. 5 & 21-28, http://www.ibanet.org/Document/Default.aspx?DocumentUid=7FCF610E-BEA8-4E06-99B1-B89C34A87BCD
[677] International Bar Association, *International Access to Justice: Barriers and Solutions*, 2014, p. 5 & 29-32, http://www.ibanet.org/Document/Default.aspx?DocumentUid=7FCF610E-BEA8-4E06-99B1-B89C34A87BCD
[678] This study will be discussed below starting from page 143.
[679] A. CANÇADO TRINDADE, *The Access of Individuals to International Justice*, OUP, 2011, 17-18.
[680] Council of Europe, *Explanatory Report to Protocol 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention*, Council of Europe Treaty Series – No. 194, 13 May 2004, §. 10.
[681] J.H. GERARDS, L. R. GLAS, "Access to justice in the European Convention on Human Rights system", *Netherlands Quaterly of Human Rights*, 2017, Vol. 35(1), 13.

Strasbourg. Secondly, the standards set by the Consultative Council of European Judges (CCJE) and the CEPEJ will be assessed. Based on these sources, combined with the human rights framework of access to justice as set out above, several common denominators will be deduced. These factors are then used to operationalize access to justice in the context of this thesis.

1. The right to access to justice from the viewpoint of the European Court of Human Rights

Looking at the history and wording of the Convention, it is clear that the European Human Rights system was meant to offer a broader protection than merely access to court.[682] The Preamble to the Convention states that it is meant "*to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration*".[683] How this is interpreted in practice, is explained in the Court's case law with respect to article 6 (the right to a fair trial) and article 13 (the right to an effective remedy) of the ECHR.[684] These articles however deal with how national systems are held to respect, protect and fulfil the right to access to justice based on the European Convention. Access to the Court itself is on the other hand laid down in article 34 of the Convention, which ensures for the applicants a right to individual application. Below, it will be argued that this is the equivalent of the right to access to justice at the level of the ECHR.

a. The right to a fair trial and the right to an effective remedy.

i The Right to a Fair Trial – Article 6 ECHR

The European Court of Human Rights has situated the right to access to justice within article 6 of the European Convention. It is has posed that article 6(1) ECHR guarantees the right of access to a court first in the case of *Golder v. UK* of 1975.[685] Although the right of access was not explicitly written into the article, the Court found that it could logically be inferred from the text.[686] The case further makes clear that access to justice is to be conceived as a practical right. The case concerned a convicted prisoner who was refused permission to contact his solicitor in order to institute civil proceedings against a prison officer. The right must thus not be a mere formal possibility, but it must be feasible in reality.[687] Through the evolution of the case law, the Court has broadened the scope of the concept of access to a court. In the case of *Golder v. UK*, the breach consisted of Mr. Golder's impediment to use his right to access to a lawyer. In *Airey v. Ireland*, the applicant was refused legal aid, leading to her not being able to access the court.[688] The Court further stated that requiring a high fee to institute civil proceedings can

[682] J.H. GERARDS, L. R. GLAS, "Access to justice in the European Convention on Human Rights system", *Netherlands Quaterly of Human Rights*, 2017, Vol. 35(1), 14-15.
[683] Preamble, §5 to the ECHR.
[684] The scope of article 6 of the Convention is quite limited, as it only pertains to courts in criminal and civil proceedings. As a result, article 13 of the Convention which has a much broader scope will play a major role here.
[685] ECtHR, *Golder v. UK*, Application no. 4451/70, 21 February 1975; D.J. HARRIS, M. O'BOYLE, C. WARBRICK, *Law of the European Convention on Human Rights*, OUP, 2009, p; 235.
[686] ECtHR, *Golder v. UK*, Application no. 4451/70, 21 February 1975, § 36.
[687] D.J. HARRIS, M. O'BOYLE, C. WARBRICK, *Law of the European Convention on Human Rights*, OUP, 2009, p. 235; European Union Agency for Fundamental Rights, *Access to Justice in Europe: an overview of challenges and opportunities*, 2010, p. 17 http://fra.europa.eu/sites/default/files/fra_uploads/1520-report-access-to-justice_EN.pdf.
[688] ECtHR, *Airey v. Ireland*, Application no. 6289/73, 9 October 1979, § 26.

impede an applicant's right to access to court.[689] The right of access to justice has also been found to be breached when proceedings are stayed by the State for an unduly long period of time,[690] and where there was no coherent system governing recourse ensuring the litigants a '*clear, practical and effective opportunity'* to go to court.[691] The Court further elaborated on how the right of access to justice works throughout a procedure, ending with the enforcement of court decisions as well in the *Jeličić v. Bosnia and Herzegovina* case:

> *"To construe Article 6 as being concerned exclusively with access to a court and the conduct of proceedings would indeed be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention. Execution of a judgment given by any court must therefore be regarded as an integral part of the "trial" for the purposes of Article 6."*[692]

ii The Right to an Effective Remedy – Article 13 ECHR

Access to a court under article 6 focusses on specific rights – criminal or civil – which can be the subject of a claim before a court.[693] This does not however encompass all legal issues which can lead to a judicial decision. Therefore, the right to an effective remedy as guaranteed in article 13 of the Convention will also be of importance in this respect. Article 13 requires the existence of an effective remedy at the national level in order to enforce human rights domestically. This is the embodiment of the subsidiarity principle, an element which is of crucial importance in the context of pilot judgments.[694]

The case law of the Court provides that access to an effective remedy need not necessarily be through a judicial body.[695] Such a remedy must be effectively accessible both in practice and in law.[696] It further possible that an aggregate of remedies together provide for an effective remedy, in satisfaction of article 13, rather than just one available remedy.[697] The Court regards a measure to be effective when "*it could have prevented the alleged violation occurring or continuing or could have afforded the applicant appropriate redress for any violation that had*

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[689] ECtHR, *Weissman and Others v. Romania*, Application no. 63945/00, 24 May 2006, § 40.
[690] ECtHR, *Kutic v. Croatia*, Application no. 48778/99, 1 March 2002, § 33.
[691] ECtHR, *De Geouffre de la Pradelle v. France*, Application no . 12964/87, 16 December 1992, §. 34; D.J. HARRIS, M. O'BOYLE, C. WARBRICK, *Law of the European Convention on Human Rights*, OUP, 2009, p. 238.
[692] ECtHR, *Jeličić v. Bosnia and Herzegovina*, application no 41183/02, 31 October 2006 , § 38.
[693] ECtHR, *Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (criminal limb)*, Council of Europe, 2014; ECtHR, *Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (civil limb)*, Council of Europe, 2013.
[694] M. KUIJER, "Effective remedies as a fundamental rights", *Seminar on human rights and access to justice in the EU*, Escuela Judicial Española and European Judicial Training Network, 28-29 April 2014, Barcelona, p. 1-2.
[695] As the recent case of *Tagayeva and others v Russia* shows, an effective remedy for victims could also be seen in a truth-finding Parliamentary commission, which serves as an additional element in their right to access to justice. (ECtHR, *Tagayeva and others v. Russia*, application nos. 26562/07, 14755/08, 49339/08, 49380/08, 51313/08, 21294/11, 37096/11, 13 April 2017, § 631).
[696] ECtHR, *Tagayeva and others v. Russia*, application nos. 26562/07, 14755/08, 49339/08, 49380/08, 51313/08, 21294/11, 37096/11, 13 April 2017, § 618.
[697] ECtHR, *Abramiuc v. Romania*, application no 37411/02, 24 February 2009, § 119; ECtHR, *Tagayeva and others v. Russia*, application nos. 26562/07, 14755/08, 49339/08, 49380/08, 51313/08, 21294/11, 37096/11, 13 April 2017, 621.

already occurred."[698] More tangibly, effectiveness is found in five criteria.[699] Firstly, the authority providing the remedy must be independent. This is especially important when the authority is not a judicial body.[700]

Secondly, an effective remedy requires the seized authority to be flexible. This means that it must not apply rigid formalism and must take into account the factual situation of the issue before it so as to not merely mechanically apply a fixed set of rules.[701] Thirdly, this flexibility must be balanced with legal certainty. As a result, sufficient safeguards against arbitrariness must be in place.[702] Fourthly, the Court attaches importance to the transparency of the procedure used in this domestic remedy.[703] Lastly, the decision must be rendered within a reasonable time.[704]

b. The right to individual application as protected under article 34 of the ECHR.

The right to individual petition as safeguarded under article 34 of the ECHR has been named as the main cause for the Court's backlog.[705] This right to individual petition is however the translation of the right to access to justice within the European Human Rights System. It can be argued that it is a leap to infer the existence of a right to access to justice in the international courts from the acknowledgement of its national dimension. The right to access to justice has been said to be a customary right when it comes to national legal systems. There is on the other hand no consensus that there exists an international counterpart.[706] It can however be argued that the European Court has answered this question with respect to access to its own judicial system. The European Convention contains a right of individual application in its article 34:

> *"The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto.*

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[698] ECtHR, *Ramirez Sanchez v France*, application no. 59450/00, 4 July 2006, § 160.
[699] J.H. GERARDS, L. R. GLAS, "Access to justice in the European Convention on Human Rights system", *Netherlands Quaterly of Human Rights*, 2017, Vol. 35(1), § 16-17.
[700] ECtHR, *Souza Ribeiro v. France*, application no 22689/07, 13 December 2012, § 79.
[701] ECtHR, *Ílhan v. Turkey*, application no 22277/93, 27 June 2000, § 51; ECtHR, *Broniowski v. Poland*, application no. 31443/96, 22 June 2004, § 151.
[702] ECtHR, *Maskhadova and others v Russia*, application no. 18071/05, 6 June 2013, § 245.
[703] J.H. GERARDS, L. R. GLAS, "Access to justice in the European Convention on Human Rights system", *Netherlands Quaterly of Human Rights*, 2017, Vol. 35(1), 17.
[704] J.H. GERARDS, L. R. GLAS, "Access to justice in the European Convention on Human Rights system", *Netherlands Quaterly of Human Rights*, 2017, Vol. 35(1), 17.
[705] W. VERRIJDT, "Chapter 19 – The Limits of the International Petition Right for Individuals: A Case Study of the ECtHR", in B. KEIRSBILCK, W. DEVROE AND E. CLAES, *Facing the Limits of the Law*, Springer, 2009, 333; K. DZEHTSIAROU, A. GREENE, "Restructuring the European Court of Human Rights: preserving the right of individual petition and promoting constitutionalism", in M. SUNKIN, *Public Law*, Sweet & Maxwell, October 2013, 710; L. BOJIN, "Challenges facing the European Court of Human Rights: Fragmentation of the international order, division in Europe and the right to individual petition" in S. FLOGAITIS, T. ZWART AND J. FRASER (eds.), *The European Court of Human Rights and its discontents – Turning Criticism into Strenght*, Edward Elgar Publishing, 2013, 60.
[706] P. SCHMITT, *The right of access to justice for individual victims of human rights violations by international organizations*, Doctoral thesis submitted at KU Leuven, 2015.

> *The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."*[707]

Further, Lambert Abdelgawad has in the context of access to justice clarified that *"[w]hat the Court has affirmed in respect of the judgments of domestic courts and tribunals also applies to judgments of the Court itself, since the Convention for the Protection of Human Rights and Fundamental Freedoms […] is subsidiary to domestic legal systems*."[708] The right to individual application could thus be regarded as the European Human Rights System's counterpart to the right of access to justice pertaining to national legal systems.

The right to individual application seems to create a right to direct access to the Court. It ensures that applicants have a direct way of addressing their claims to the Court, which then decides on the matter and brings justice to the individual. On the contrary, read together with the subsequent article 35 of the Convention which outlines the admissibility criteria, it could be argued that access to the Court is merely indirect, as it can only be seized after the exhaustion of all effective domestic remedies. Furthermore, in the context of pilot judgments, the Court is focussing heavily on the underlying issue, rather than on the situation of the individual involved. The Court has indeed stated in the *Wolkenberg* decision that it "*cannot be converted into providing individualized financial relief in repetitive cases arising from the same systemic situation'.*[709] Gerards and Glas come to the conclusion that the Court offers a dual form of access to justice: "*In short, the consensus seems to be that the Court's primary task is to provide direct access to substantive justice and that this is a goal in itself. In addition, it (increasingly) plays a role in providing indirect access to justice, for it also contributes to general justice."*[710]

It is important to point to the use of the wording "effective exercise" of the right to individual petition in article 34. The question thus arises what the Court regards to be an effective exercise of the right to access to court. It seems that this is interpreted in a rather practical way. The Court has for instance found that there was no effective access to the Court in a case where relatives of a prisoner were not allowed to visit, so that this person had lost all contact with the outside world. These circumstances were then combined with the fact that meetings with his lawyer were monitored and there was no access to certain documents.[711] The Court has further found a violation of article 34 in a case were a prisoner was not given paper and stamps by the prison authorities, making it factually impossible for him to reply to the Court in time.[712]

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[707] Article 34 ECHR.
[708] E. LAMBERT ABDELGAWAD, *The execution of judgments of the European Court of Human Rights*, Council of Europe Publishing, 2008, 5.
[709] ECtHR decision, *Andrzej Wolkenberg and others v. Poland*, application no. 50003/99, 4 December 2007, § 76.
[710] J.H. GERARDS, L. R. GLAS, "Access to justice in the European Convention on Human Rights system", *Netherlands Quaterly of Human Rights,* 2017, Vol. 35(1), 18.
[711] ECtHR, *Eriomenco v. Republic of Moldova and Russia*, application no 42224/11, 9 May 2015.
[712] ECtHR, *Cotlet v. Romania*, application no. 38565/97, 3 June 2003; R. TOMA, "Chapter 2. The sanctioning of hindrances to the exercise of the right of individual petition before the European Court of Human Rights: is it effective?" in E. LAMBERT ABDELGAWAD (ed.), *Preventing and sanctioning hindrances to the right to individual petition before the European Court of Human Rights*, Intersentia, 2011, 33.

2. Access to justice criteria developed by the CCJE and the CEPEJ

Further, the Consultative Council of European Judges (CCJE) - an advisory body of the Council of Europe on issues related to the independence, impartiality and competence of judges – adopted a Magna Carta of Judges in November 2010. In this document, the CCJE elaborates on fundamental principles concerning the judiciary. This document includes the following elements under the umbrella of access to justice: transparency of justice, the dissemination of information on the operation of the justice system, the use of accessible language, decisions must be motivated and taken within a reasonable time, appropriate case management methods must be used and court orders must be enforced.[713]

From a more practical point of view, the abovementioned checklist that the CEPEJ developed for promoting the quality of justice and the courts is important. In this document, the CEPEJ looks at the quality of a justice system from the perspective of its users. In this analysis, it has stressed that three factors are important for a qualitative judicial system: a sufficient level of access to justice, an acceptable degree of public trust in the judiciary, and legitimacy.[714] To this end, the CEPEJ has further created a checklist, in which it elaborates what it regards as included in the concept of access to justice. It conceptualizes access to justice as encompassing several pillars. The first pillar looks at access to legal and court information, whereby regard is paid to the publication of laws and judicial decisions, the use of interpreters, the dissemination of information concerning rights and obligations that is adapted to its target audience, and the representation of litigants including the question whether this representation is a monopoly of lawyers.[715] Secondly, the checklist includes questions concerning financial access, focusing on legal aid schemes and court fees.[716] The third prong looks into the physical and virtual access to the courts, addressing issues of location, services for persons with disabilities or elderly people, provisions to hold hearings in other locations, but also policies directed towards alternative dispute resolution.[717] The fourth part deals with the treatment of parties, ensuring that they are treated with dignity, that they understand the legal language of the proceedings,

[713] Council of Europe Consultative Council of European Judges, *Magna Carta of Judges*, CCJE (2010)3, 17 November 2010, https://wcd.coe.int/ViewDoc.jsp?id=1707925.
[714] European Commission for the Efficiency of Justice, *Checklist for Promoting the Quality of Justice and the Courts*, 3 July 2008, https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ%282008%292&Language=lanEnglish&Ver=original&Site=DGHL-CEPEJ&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6.
[715] European Commission for the Efficiency of Justice, *Checklist for Promoting the Quality of Justice and the Courts*, 3 July 2008, https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ%282008%292&Language=lanEnglish&Ver=original&Site=DGHL-CEPEJ&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6.
[716] European Commission for the Efficiency of Justice, *Checklist for Promoting the Quality of Justice and the Courts*, 3 July 2008, https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ%282008%292&Language=lanEnglish&Ver=original&Site=DGHL-CEPEJ&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6.
[717] European Commission for the Efficiency of Justice, *Checklist for Promoting the Quality of Justice and the Courts*, 3 July 2008, https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ%282008%292&Language=lanEnglish&Ver=original&Site=DGHL-CEPEJ&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6.

and taking into account the cost of proceedings for the parties.[718] Lastly, the checklist focusses on the delivery of the decisions, asking whether the pronouncement and the motivation of the judgment are comprehensible, whether the motivation is detailed and systematic, whether the reasons given demonstrate fairness and lawfulness of the decisions, and whether standard decisions and rules are used for bulk cases.[719]

3. Common denominators encompassing the right to access to justice

In order to operationalize the meaning of access to justice in the context of this thesis, the common denominators from all of these sources are taken into account. This wide array of sources employ a variation of different factors which can nonetheless be brought back to several common elements. These can be brought back to the following schematic representation:

IV.1 COMMON DENOMINATORS ENCOMPASSING THE RIGHT TO ACCESS TO JUSTICE

	Francioni	FRA	IBA	Gerards and Glas	ECtHR	CCJE	CEPEJ
Practical ability to access Court (including legal aid)	x	x	x	x	x		x
Access to legal information (including the use of accessible language)			x			x	x
Access to alternative dispute resolution mechanisms			x				x
Due process standards and procedural justice	x		x	x			x
Appropriate case management tools (including having a decision within a reasonable time)		x			x	x	

Consequently, the right to access to justice as envisioned in this doctoral research will consequently be regarded as an umbrella right, encompassing the following elements. Firstly, access to justice includes the classic idea of applicants having the practical ability to reach the Court. This not only supposed the practical possibility of bringing a claim before the Court, it also includes the right to legal aid when necessary. Secondly, the concept must include access to legal information as to how the judicial system works and which rights and obligations the applicants have. This also includes the use of accessible language. Thirdly, access to justice needs to encompass the applicants' access to alternative dispute resolution mechanisms. Fourthly, almost all abovementioned sources have mentioned the importance of due process standards and procedural justice. The procedural justice concepts used in this respect will more thoroughly be explained below under "fair procedures, due process and concepts of procedural

[718] European Commission for the Efficiency of Justice, *Checklist for Promoting the Quality of Justice and the Courts*, 3 July 2008, https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ%282008%292&Language=lanEnglish&Ver=original&Site=DGHL-CEPEJ&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6.
[719] European Commission for the Efficiency of Justice, *Checklist for Promoting the Quality of Justice and the Courts*, 3 July 2008, https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ%282008%292&Language=lanEnglish&Ver=original&Site=DGHL-CEPEJ&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6.

justice." starting from page 150. Fifthly, access to justice also includes appropriate case management tools. It thus also supposes that the applicants have an interest and a right to an efficient justice mechanism.

Lastly, work package 5 of the Human Rights Integration project hypothesized that access to justice posed specific problems with respect to vulnerable applicants. It states that "in particular members of vulnerable groups still experience practical and legal ostacles hindering them to effectively pursue cases of alleged human rights violations." In the context of pilot judgments, the question might be raised whether there is a prevalence of vulnerable applicants in these cases and whether they experience other or more difficulty in exercising their right to access to justice. In a last part in the following sub-chapter thus, the role of the vulnerable status of applicants in this process will be discussed.

C. How accessibility is conceptualized in this thesis

These common denominators will subsequently be operationalized in order to be used in the empirical research conducted in the context of this thesis.

1. Access to legal representation, free when necessary

Legal aid was not a focus of the empirical research conducted at the European Court or with the applicants' representatives. Applicants first need to exhaust domestic remedies before they can submit their complaint to the European Court of Human Rights.[720] Access to free legal aid is included in the European Convention and must thus be guaranteed in the national legal systems of all Council of Europe States for persons who can show that they lack sufficient means to pay for legal assistance and when the interests of justice so require.[721] Ideally thus, necessitous applicants already have procured legal representation before they come to the Court. Consequently, as States are already under an obligation to provide potential applicants with free legal presentation when need be, this should not present a problem before the European Court as well.

In the event that applicants do not have legal representation when applying to Strasbourg however, the Court has a legal aid scheme available.[722] Legal aid at the Court can only be requested after the case has been communicated to the involved government.[723] This thus means that the involved applicant must submit the application form without the assistance of a lawyer if they were not able to procure one based on a national legal aid scheme. The Court has reformed this application form with the amendment of Rule 47 in 2015, establishing stricter rules on what to include in the form. Failure to comply with the requirements will automatically

[720] Article 35 ECHR.
[721] Article 6, §3 (c) ECHR; early established case law elaborated on in, inter alia, the cases of ECtHR, *Pakelli v. Germany*, application no. 8398/78, 25 April 1983; ECtHR, *Granger v. United Kingdom*, application no. 11932/89, 28 March 1990; ECtHR, *Benham v. United Kingdom*, application no. 19380/92, 10 June 1996; ECtHR, *Quaranta v. Switzerland*, application no; 12744/87, 24 May 1991.
[722] European Court of Human Rights, *Your application to the ECHR: How to apply and how your application is processed*, 11, available at: http://echr.coe.int/Documents/Your_Application_ENG.pdf.
[723] European Court of Human Rights, *Your application to the ECHR: How to apply and how your application is processed*, 11, available at: http://echr.coe.int/Documents/Your_Application_ENG.pdf.

lead to the Court not examining the case.[724] On the other hand, the Court has composed a number of documents, detailing how to complete this application form and what the common mistakes are in doing so.[725] These documents are geared towards making this first step more comprehensible for the potential applicants aiming to reach the Court.[726] Lastly, it must be emphasized that human rights NGO's and lawyers having ties to these organizations perform a primordial task with respect to safeguarding access to justice to certain groups of applicants.[727]

In conclusion, seeing firstly that legal aid will mostly be procured through the national system based on article 6 of the European Convention on Human Rights, and secondly that the Court has an alternative system of legal aid for when that is not the case, the element of access to legal representation is not separately included in this study.

2. Access to clear legal information

Access to clear legal information is meant to enable applicants to firstly, make an informed decision about turning to the Court and to secondly, know how their application will be handled. The Court has developed a number of tools in this respect for applicants. As explained above on page 147, applicants have relatively easy access to information as to the initiation of a case through submitting a valid application. As to the content of their claims, all case law is published on the HUDOC website.[728] In order to make this more manageable, applicants have access to multiple case law guides and research reports through the Court's website, sorted either by Convention article or by theme.[729] The Court additionally has invested in making its case law more accessible to the public with offering translations in other Council of Europe languages than French and English.[730] For applicants who have submitted a claim before the Court, the website further features an online tool which makes it possible to follow the state of proceedings of their cases.[731] This tool is however only available for cases which have already been allocated to a judicial formation. This means that these cases have already been communicated to the Government. For case management reasons, the Court sometimes decides to not communicate cases pending a similar pilot judgment procedure.

[724] Rule 47, specifically Rule 47§5.1 of the Rules of Court.
[725] European Court of Human Rights, *Notes for filling in the application form*, January 2016, available at: http://echr.coe.int/Documents/Application_Notes_ENG.pdf; European Court of Human Rights, *Common Mistakes in Filling in the Application Form and How to Avoid Them*, 1 January 2016, available at: http://echr.coe.int/Documents/Applicant_common_mistakes_ENG.pdf.
[726] These documents are accompanied by detailed information, drafted in accessible language on a part of the Court's website specificially set up for applicants. See: http://echr.coe.int/Pages/home.aspx?p=applicants/forms&c=.
[727] This importance will be discussed under "The role of NGO's in pilot judgments: third party interventions and NGO representation." starting from page 173.
[728] HUDOC can be accessed here: https://hudoc.echr.coe.int/eng#{"documentcollectionid2":["GRANDCHAMBER","CHAMBER"]}.
[729] Case law guides are drafted according to Convention article and can be found here: http://echr.coe.int/Pages/home.aspx?p=case law/analysis/guides&c=#; Case law research reports are sorted by theme and can be accessed here: http://echr.coe.int/Pages/home.aspx?p=case law/analysis/researchreports&c=.
[730] European Court of Human Rights, *The Interlaken process and the Court*, 1 September 2016, § 32.
[731] This 'State of Proceedings' tool can be found here: http://app.echr.coe.int/SOP/index.aspx?lg=en.

Certainly in the context of a pilot case, information is of primordial importance. The pilot judgment procedure was created through practice and until recently, the procedure was still in its start-up phase. As a result, information about how the procedure works in general was not easily accessible, not to scholars let alone to applicants coming to the Court with their individual cases. The Court recently started to expand the extent of the information it circulates concerning the pilot judgment procedure. For the past few years, the Court has started to publish an information note on pilot judgments. This note briefly explains what the procedure is and which objectives it is meant to serve. It then discusses all cases considered by the Court as pilot cases with a brief overview of the facts and the general measures ordered by the Court. The latest version of the Pilot Judgment Factsheet of October 2017 also includes information on the follow-up decisions succeeding previous pilot judgments, indicating that this has become standard practice.[732]

Rule 61 elaborates on the information that is provided to the applicants involved in a pilot judgment procedure. With respect to the applicants directly involved in the pilot case, it is indicated that the Court will seek their views as to the existence of a systemic issue and the suitability of the application of the procedure.[733] This rule does not indicate whether these applicants are expressly being informed about the pilot judgment procedure. Are they informed about how this procedure will work, how their specific case is going to be handled, and what the consequences are for their case? When then the applicants submit their views, what is the weight given to these submissions? And if the Court does not follow these submissions, does it inform the applicants about the reasons for not doing so?

Rule 61 further explains that the applicants of the adjourned cases will be informed "in a suitable manner" of the decision to adjourn. They will also be notified of all relevant developments affecting their case.[734] Renata Degener and Paul Mahoney, both working on the case of Broniowski at the time, clarify that in adjourning the similar applications, all the applicants were individually informed of the adjournment. This included information concerning the consequences of the adoption of the pilot judgment procedure for the further handling of their cases. Subsequently then, the applicants were advised of the procedural developments in the leading case, including in the friendly settlement.[735] Rule 61, adopted after the Broniowski judgment, does not indicate what kind of information is provided to these applicants, which manner is used to distribute the information, and when they are provided with this information. There is also no indication that these applicants are given the opportunity to submit their views concerning the application of the procedure to the Court. It is thus not clear whether the method of dealing with these adjourned applications had become standard practice. Therefore, these questions were of importance during the interviews at the Court. With respect to the questions posed to the human rights lawyers and representatives of human rights NGO's

[732] European court of Human Rights, *Pilot Judgments - Factsheet*, October 2017.
[733] Rule 61 .2 (a) Rules of Court.
[734] Rule 61. 6 (b) of the Rules of Court.
[735] R. DEGENER, P. MAHONEY, "The Prospects for a test case procedure in the European Court of Human Rights" in D. PLAS, M. PUÉCHAVY, *Trente ans de droit européen des droits de l'homme. Etudes à la mémoire de Wolfgang Strasser,* Anthemis, 2008, 181.

involved in these cases, their intermediary roles were taken into account. The focus was on how they communicated with the Court and how they in turn translated this communication to their clients.

3. Alternative dispute resolution mechanisms? friendly settlements and unilateral declarations.

The European Human Rights system includes the possibility for friendly settlements. The Convention explains that the Court may place itself at the disposal of the parties if they wish to engage in friendly settlement negotiations at any stage of the proceedings. The result of such a procedure is that the Court strikes the case out of its list and transmits the decision to the Committee of Ministers, which is tasked with supervising the execution of the terms of the friendly settlement.[736]

The Rules of Court clarify that securing a friendly settlement in practice involves a more active approach by the Court. Once an application is declared admissible, the Registrar will enter into negotiations with the parties with a view to obtaining a friendly settlement procedure. It is only when they agree with the Registry's proposal, that the friendly settlement will have been reached.[737] Such an agreement can further only be reached in conformity with respect for human rights[738] and will not be concluded without the involvement of the Court. This thus creates the obligation for the State to execute the terms of the agreement, pursuant to its tasks laid down under article 46 of the Convention. If the State does not abide by the friendly settlement, the applicant can write a letter to the Court requesting the case be restored to its list.[739]

In the instance that the applicant does not agree to the terms of the proposal for friendly settlement the involved State can ask the Court to allow a unilateral declaration. Such a declaration clearly acknowledges that there has been a violation, includes redress measures and contains, if appropriate, remedial measures to be taken by the State. The Court can then strike the case out of its list if it is satisfied that respect for human rights does not require it to continue examination, even if the applicant wishes otherwise.[740]

An approved agreement or – if there is no agreement, an approved unilateral declaration - is thus a judicial settlement and might arguably not be characterized as an alternative dispute resolution mechanism.[741] Alternative dispute resolution (ADR) is an umbrella term encompassing varying means to resolve conflict, either within or outside the formal legal system but always without adjudication or decision by a judge. ADR is built on the basic principles of negotiation, mediation and arbitration. Mediation is a process in which a neutral and unbiased third party facilitates a negotiated agreement between parties, without resulting

[736] Article 39 ECHR.
[737] Rule 62 of the Rules of Court.
[738] Article 39 ECHR.
[739] H. KELLER, M. FOROWICZ AND L. ENGI, *Friendly settlements before the European Court of Human Rights – Theory and Practice*, OUP, 2010, 39.
[740] Rule 62A of the Rules of Court.
[741] H. KELLER, M. FOROWICZ AND L. ENGI, *Friendly settlements before the European Court of Human Rights – Theory and Practice*, OUP, 2010, 38.

in a formal decision. Arbitration involves a third party, chosen by the conflicting parties, taking a decision in a less formal manner than a court. [742] Resolving a conflict through ADR also means that the legal system is not involved resulting in the fact that the solution is not necessarily found in legal rights. Importantly, all forms of ADR are conducted in private, both in terms of process as well as outcome.[743]

The use of friendly settlements and unilateral declarations can thus not be regarded as a form of alternative dispute resolution made possible within the confines of the European Convention. In reality, the Registrar who is part of the Court's Registry and who is thus not neutral nor unbiased makes a proposal to the state and the applicant.[744] They can either accept or reject this proposal. If accepted by both parties, the Court can then promulgate this proposal as a friendly settlement. If only the involved State accepts, the Court can still accept it as a unilateral declaration. The Court is very much involved. Friendly settlements and unilateral declarations are thus not forms of ADR. As a result, it can be concluded that the Court does not provide for such forms of solving a legal dispute, contrary to the criteria of access to justice developed in the context of this dissertation. Friendly settlements and unilateral declarations however do play an important role in pilot judgment. They will thus be part of this thesis, under a separate heading. They will however not be termed as part of alternative dispute resolution mechanisms.

In the context of a pilot judgment procedure, Rule 61 requires for a friendly settlement to be accepted by the Court that it contains a declaration by the State concerning firstly, the implementation of general measures directed towards remedying the underlying systemic issue and secondly, the redress offered to the actual and potential applicants.[745] A friendly settlement will thus only be allowed when the State also deals with the general issue and takes the interests of the other applicants into account.[746]

In the context of this thesis, it was important to know how friendly settlements take form with respect to pilot judgments: who is involved in these talks and what is the result of these friendly settlements? The question whether they are successful here and how that success is defined was also raised. The human rights lawyers were asked how they regarded the use of friendly settlements and unilateral declarations in the context of pilots.

4. fair procedures, due process and concepts of procedural justice.

All abovementioned sources include substantive due process guarantees and fair procedures in the concept of access to justice. Due process entails the principle that the State, or the Court in

[742] C. MENKEL-MEADOW, "Mediation, Arbitration and Alternative Dispute Resolution (ADR)", in J.D. WRIGHT, *International Encyclopedia of the Social & Behavioral Sciences*, Elsevier, 2015, 70.
[743] SCOTTISH CIVIL JUSTICE COUNCIL, *Access to Justice Literature Review: Alternative Dispute Resolution in Scotland and other jurisdictions*, July 2014, 1.
[744] This process was uncovered during the Interviews in Strasbourg, as will be discussed below from page 160.
[745] Rule 61.7 of the Rules of Court.
[746] ECtHR decision, *Załuska and Rogalska v. Poland*, application nos. 53491/10 and 72286/10, 20 June 2017, § 34.

this instance, abides by the rule of law. This ultimately aims to result in fair procedures.[747] In order to put a focus however on the experience of fairness of the users of the legal system, this thesis will employ concepts of procedural justice.

a. General overview

Procedural justice refers to a collection of criteria that a procedure must meet in order to be perceived as fair by its user. It is believed that a procedure which is evaluated by an individual as fair will be high in quality and will thus improve access to justice.[748] Previous research has indicated that users of a justice system determine fairness not only by how fair and satisfactory they find the outcome of the procedure (distributive justice) but also by how they estimate the fairness of the decision-making process (procedural justice).[749] There is a whole body of literature on procedural justice, starting from the first notion of the concept by Thibault and Walker in 1975.[750] This thesis will however thoroughly focus on how the study of procedural justice has informed the operationalization of this part of the access to justice concept used.

Several authors have endeavoured to uncover which elements make a procedure fair in the eyes of its users. Procedural justice entails an enormous body of literature written from a myriad of different angles. This research has focussed on two great areas in which procedural justice theory was developed. The first focus is on the concept of procedural justice in the criminal justice system which is the focus of Thibaut and Walker, and later, of Lind and Tyler. This body of research places procedural justice concepts in a judicial sphere, making it particularly relevant for the topic of this thesis. Secondly, this thesis looks at the concept of origanisational justice which is the specialization of Leventhal's research who first developed his theory more broadly with respect to social relationships. The situation of the applicants in a pilot judgment procedure, virtually placed in a large group of similarly situated others, is different than the situation of a single defendant in a criminal procedure. Furthermore, human rights cases are litigated differently and take place in a different context than in a domestic criminal trial. As a result, procedural justice principles which are more adaptable to this situation were needed. The principles developed by Leventhal were equally applicable to the situation of the applicants in this context. As a result, the conceptualization of procedural justice in this doctoral research will encompass the ground principles of both bodies of research. In incorporating both sets of principles, it has been ensured that overlap is included under the heading of an encompassing principle.

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[747] A. H. E. MORAWA, "Substantive Due Process in International Human Rights Law: International Tribunals and the Review of Domestic Decisions" in D. GIRSBERGER, M. LUMINATI (eds.), *ZGB gestern - heute – morgen. Festgabe zum Schweizerischen Juristentag 2007,* Schulthess Verlag, 2007, 67.

[748] L. KLAMING AND I. GIESEN, "Access to Justice: The Quality of Procedure", TISCO Working Paper Series on Civil Law and Conflict Resolution Systems No. 002/2008, 1.

[749] B. MCGONIGLE LEYH, *Procedural justice? Victim Participation in International Criminal Proceedings*, Intersentia, 2011, 47.

[750] J. THIBAUT, L. WALKER, *Procedural justice: a psychological analysis*, L. Erlbaum Associates, 1975; but also among others E. A. LIND, T. R. TYLER, *The Social Psychology of Procedural Justice*, Plenum Press, 1988; E. A. LIND, P. C. EARLY, R. KANFER, "Voice, Control and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments", 59 *Journal of Personality and Social Psychology*, 1990; T. R. TYLER, *Procedural Justice*, Ashgate, 2005.

b. Parameters of procedural justice used in this dissertation.

(i) Voice

The first element which is important here is voice, a criterion developed by Lind and Tyler in the context of criminal justice. Voice gives applicants the opportunity to share their viewpoints and to present their case.[751] The adjournment of similar pending cases in and of itself principally can pose a problem in this respect, as the involved applicants are not given a chance anymore to have their case examined by the Court. In the context of this thesis, it was important to know how the applicants, both from the pilot case as from the similar pending cases express their views during the procedure. In the interviews with the applicants' representatives, this question was more focussed on how the shape the applicants' participation as to the presentation or the strategy of the case.

Secondly, it must be emphasized that generally victims of violations are not included in the procedure before the Committee of Ministers concerning execution. The applicants are able to submit information to the Committee concerning the individual measures and payment of just satisfaction by the State. This information however still is discussed in a meeting where the State is represented but the victims are not. The execution of the judgment is therefore outside of the control of the applicant. [752] It must nevertheless be added that NGO's, national institutions and applicants are able to make documents available to the Committee of Ministers, which may be similar to the actual oral arguments and may provide a starting point for consideration by the Department for the Execution of Judgments."[753] This does provide a manner for the victims to get their voices heard. Consequently, the interviews also included questions concerning the involvement of the applicants' lawyers at the Committee of Ministers and the strategies employed by the relevant NGO's in this respect.

(ii) Consistency and bias suppression

This research is further based on the conceptualisation of procedural fairness worked out by Leventhal in 1980, who was among the first to propose six specific criteria that a procedure

[751] L. KLAMING AND I. GIESEN, "Access to Justice: The Quality of Procedure", TISCO Working Paper Series on Civil Law and Conflict Resolution Systems No. 002/2008, 5; E. A. LIND, T. R. TYLER, *The Social Psychology of Procedural Justice*, Plenum Press, 1988, 170.

[752] E. LAMBERT ABDELGAWAD, "The Execution of the Judgments of the European Court of Human Rights: Towards a Non-oercive and Participatory Model of Accountability", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2009, 473.

[753] Under Rules 9.1 and 9.2 adopted in 2006 by the Committee of Ministers. National authorities are also able to appear before the Committee of Ministers at the request of the Permanent Representative; E. LAMBERT ABDELGAWAD, "The Execution of the Judgments of the European Court of Human Rights: Towards a Non-oercive and Participatory Model of Accountability", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2009, 473-474.

must meet: consistency, bias suppression, accuracy, correctability, representation and ethicality.[754]

Consistency entails that procedures must be applied consistently across people and across time.[755] The respondents at the Court were thus asked how the decision is taken to apply the pilot judgment procedure. Which parameters are important here, which criteria are used and what influences the decision to apply the procedure? These questions also relate to bias suppression, meaning that the decision-maker should be neutral.

(iii)Accuracy

Accuracy requires that the decision is taken based on correct and accurate information. The Court's case law indicates that it bases itself on a variety of sources in order to show that the problem is indeed systemic and what the repercussions are on the applicants. Firstly, the Court might base itself on other Council of Europe sources. This includes decisions by the Parliamentary Assembly, such as in *Ananyev and Finger.*[756] Other cases refer to documents of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), a body which visits prisons in all Council of Europe States and monitors whether they adhere to the requirements of the Convention.[757] Documents by the Committee of Ministers are also regularly referenced by the Court.[758]

The Court in most pilot cases refers to existing case law concerning the issue, indicating that the problem is already known. It both looks at decisions pronounced by national courts[759] or one of its own previous judgments dealing with the same issue. With respect to its own judgments, it might point towards the fact that it has already found similar violations with

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[754] G.S. LEVENTHAL, "What should be done with equity theory? New approaches to the study of fairness in social relationships." In K.J. GERGEN, M.S. GREENBERG AND R.H. WILLIS (eds.), *Social exchange: advances in theory and research*, Plenum, 1980.

[755] L. KLAMING AND I. GIESEN, "Access to Justice: The Quality of Procedure", TISCO Working Paper Series on Civil Law and Conflict Resolution Systems No. 002/2008, 6.

[756] ECtHR, *Ananyev and others v. Russia*, application nos. 42525/07 and 60800/08, 10 January 2012, § 186; ECtHR, *Finger v. Bulgaria*, application no. 37346/05, 10 May 2011, § 115.

[757] ECtHR, *Ananyev and others v. Russia*, application nos. 42525/07 and 60800/08, 10 January 2012, § 186; ECtHR, *Neshkov and others v. Bulgaria*; application nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, 27 January 2015, § 269; ECtHR, *Rezmiveş and others v. Romania*, application nos. 61467/12, 39516/13, 48231/13 and 68191/13, 25 April 2017, § 108.

[758] ECtHR, *Rezmiveş and others v. Romania*, application nos. 61467/12, 39516/13, 48231/13 and 68191/13, 25 April 2017, § 108; ECtHR, *Michelioudakis c Grèce*, application no. 54447/10, 3 April 2012, § 65; ECtHR, *Yuriy Nikolayevich Ivanov v. Ukraine*, application no. 40450/04, 15 October 2009, § 79; ECtHR, *Ümmühan Kaplan v. Turkey*, application no. 24240/07, 20 March 2012, § 64; ECtHR, *Glykantzi v. Greece*, application no. 40150/09, 30 October 2012, § 69; ECtHR, *Ananyev and others v. Russia*, application nos. 42525/07 and 60800/08, 10 January 2012, § 187; ECtHR, *Burdov v. Russia (no. 2)*, application no. 33509/04, 15 January 2009, § 132; ECtHR, *Greens and M.T. v. UK*, application nos. 60041/08 and 60054/08, 23 November 2010, § 112; ECtHR, *Neshkov and others v. Bulgaria*; application nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, 27 January 2015, § 268; ECtHR, *Rutkowski and others v. Poland*, application nos. 72287/10, 13927/11 and 46187/11, 7 July 2015, § 204.

[759] ECtHR, *M.C. and others v. Italy*, application no. 5376/11, 3 September 2013, § 112 ; ECtHR, *Rutkowski and others v. Poland*, application nos. 72287/10, 13927/11 and 46187/11, 7 July 2015, § 205. The Court also specifically referenced national constitutional and supreme courts, as discussed above.

respect to the same State showing that the problem has existed for a long time.[760] On the other hand, it also refers to its own previous pilot judgments dealing with a comparable issue in order to argue that it will employ the same approach and will thus apply the pilot judgment procedure.[761]

The questions used at the Court relate to the gathering of information which is then used to support the decision for applying the procedure. The questions directed towards the applicants' representatives how they argue the systemic nature of the issue.

(iv) Correctability

Correctability relates to the availability of appeal possibilities to correct inaccurate outcomes. The respondents were thus asked which possibilities are open to the applicants in case they do not agree with the outcome of the case. The situation of the applicants in the similar pending cases was also of great interest. Here, the question rose whether these applicants could challenge the choice of the pilot case and whether they had any possibilities of questioning the outcome of the pilot case as the result of the case have a bearing on them as well.

(v) Ethicality

Ethicality means that the procedure implements general ethical and moral standards. These standards could arguably found in the fundamental rights laid down in the European Convention, including the prohibition of discrimination in article 14 ECHR. This principle translates itself in the context of the pilot judgment procedure from the perspective of the applicants in the equal treatment among all similarly situated applicants. The Court has been confronted with arguments in this sense from applicants and has addressed them in varying ways. The *Stella* decision concerned a group of follow-up applicants who complained concerning the general measures set up after the *Torregiani* pilot judgment. Among other complaints, they submitted that they received a lesser amount of compensation based on the domestic compensation scheme than what the lead applicant in *Torreggiani* had received. The Court argued that it was within the State's margin of appreciation to decide on the amounts in line with the standard of living in the country, as long as the amount is not unreasonable.[762] This reasoning, which takes the viewpoint of the involved State, is opposite to what the Court has concluded in the decision of *Zaluska and Rogalska*, with respect to a group of follow-up

[760] ECtHR, *Rezmiveş and others v. Romania*, application nos. 61467/12, 39516/13, 48231/13 and 68191/13, 25 April 2017, § 107; ECtHR, *Michelioudakis c Grèce*, application no. 54447/10, 3 April 2012, § 68; ECtHR, *Gerasimov and others v. Russia*, application nos. 29920/05, 3553/06, 18876/10, 61186/10, 21176/11, 36112/11, 36426/11, 40841/11, 45381/11, 55929/11, 60822/11, 1 July 2014, § 206.

[761] ECtHR, *Michelioudakis c Grèce*, application no. 54447/10, 3 April 2012, § 64; ECtHR, *Vassilios Athanasiou et autres v. Greece*, application no. 50973/08, 20 December 2010, § 44; ECtHR, *Dimitrov and Hamanov v. Bulgaria*, application nos. 48059/06 and 2708/09, 10 May 2011, § 109; ECtHR, *Finger v. Bulgaria*, application no. 37346/05, 10 May 2011, § 114; ECtHR, *Gazsó v. Hungary*, application no. 48322/12, 16 July 2015, § 31; ECtHR, *Rumpf v. Germany*, application no. 46344/06, 2 September 2010, § 62; ECtHR, *Yuriy Nikolayevich Ivanov v. Ukraine*, application no. 40450/04, 15 October 2009, § 81.

[762] ECtHR, decision, *Stella and others v. Italy*, application no. 49169/09, 16 September 2014, §§ 61-62.

applicants to the *Rutkowski* pilot judgment. Here, the applicants had claimed that the specific circumstances in their cases warranted for a higher sum of just satisfaction. They wanted their cases to be continued, instead of adjourned and sent back domestically. The Court explained to the applicants that it is an international judicial authority whose primary task it is to render authoritative legal judgments, not to award compensation to each and every person involved. As a result, the Court argued that, in order to ensure that there is no disparity in the level of awards leading to a divisive effect among the applicants, a unified approach is called for.[763] This case can arguably also present a problem in terms of representation, which will be discussed below.[764]

Furthermore, the Court has in its case law taken on arguments against adjourning based on moral considerations. The Court tends not to adjourn in cases of sub-standard prison conditions. In *Varga*, the Court explained that this is due to the fundamental nature of the rights protected under article 3 and the importance and urgency of the complaints brought under this article.[765] With respect to two pilots concerning non-enforcement of domestic decision, the Court also decided against adjourning based on morality considerations. In the cases of *Burdov (no.2)* and *Gerasimov*, the Court found that "*it would be unfair if the applicants in such cases, who have allegedly been suffering for years as a result of continuing violations of their right to a court and sought relief in this Court, were compelled yet again to resubmit their complaints to the domestic authorities, be it on the grounds of a new remedy or otherwise*".[766]

Ethicality was not a separate area of the questionnaire used at the Court as well as with the representatives of the applicants as these principles are reflected across the questionnaire as a whole.

(vi) Representation

Representation is further a particularly interesting criterion when reviewing the pilot judgment procedure. The fact that the situation of the applicants of the similar pending cases depends on the outcome of a case to which they are not a party, raises questions. It could be argued that the pilot judgment procedure is some form of an aggregation of claims procedure, the most well-known example of which is the class action procedure. Representation in these kinds of procedures is especially important as the results have a wide impact on persons who are not necessarily involved in the procedure as such. Rule 23 of the Federal Rules of Civil Procedure, governing the class action procedure in the United States, lays down specific prerequisites with respect to the representativeness of the case, which must be fulfilled before a class action can

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[763] ECtHR decision, *Załuska and Rogalska v. Poland*, application nos. 53491/10 and 72286/10, 20 June 2017, § 52.
[764] Starting from page 154.
[765] ECtHR, *Varga and others v. Hungary*, application nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, 10 March 2015, § 116; a similar argument can be found in ECtHR, *Ananyev and others v. Russia*, application nos. 42525/07 and 60800/08, 10 January 2012, § 236.
[766] ECtHR, *Burdov v. Russia (no. 2)*, application no. 33509/04, 15 January 2009, § 144; ECtHR, *Gerasimov and others v. Russia*, application nos. 29920/05, 3553/06, 18876/10, 61186/10, 21176/11, 36112/11, 36426/11, 40841/11, 45381/11, 55929/11, 60822/11, 1 July 2014, § 230.

be certified. Firstly, the claims or defences of the applicant are typical of the claims of the class and secondly, the representative parties will fairly and adequately protect the interests of the class.[767] No such requirements exist with respect to the pilot judgment procedure. From fairly early on indeed, questions were raised about the need for a representative pilot. Interestingly, it was claimed that the Broniowski case was not an ideal representative case, as the issues involved were much to singular to show the broader underlying problem. A participant in an international workshop concerning the pilot judgment procedure stated in this respect that "these applicants must certainly have the possibility to claim that their case is different, singular, and so that their case has to be decided upon."[768] In this context, the decision of *Załuska and Rogalska* where the applicants claimed that the circumstances of their case differed from those in the previous pilot judgment of *Rutkowski* and thus warranted a higher sum of just satisfaction is also important here. Upon confrontation with this group of applicants, the Court decided to handle the case as a unilateral declaration. It first mentioned that it had previously accepted the amount of compensation in other friendly settlements and unilateral declarations coming after the Rutkowski case as being in line with respect for human rights and that it had found that the Polish government was being diligent in putting the necessary general measures in place. It further emphasized that "*it is an international judicial authority and that its principal task is to secure the respect for human rights, rather than compensate applicants' losses minutely and exhaustively."*[769] Consequently, these applicants were told that their cases would not be separately dealt with, without investigation of these particular circumstances which the applicants claimed warranted a different treatment.

The questionnaire used at the Court thus includes a question concerning the requirements for ensuring representativeness of the pilot case, as well as questions concerning the selection of a pilot case and the options of the applicants of the similar cases when they do not agree with the selection of the case. A similar question was asked in interviews with the applicants' representatives, in as far as they have any control over the selection of the pilot case.

5. Appropriate case management

Applicants also have an interest in appropriate case management and thus in the efficient functioning of the justice system in order to be able to access it. It is evident that when the Court is unable to work properly, an applicant will not be heard within a reasonable time. The Court has previously focussed on the need for timely delivery of justice for the applicants. It has used this as an argument against adjourning similar pending applications in the case of *Vassilios Athanasiou*.[770] The Court further developed a solution meant to take into account both the need for the State to take measures as well as the interests of the applicants in similar pending cases. In the *Gerasimov* case, the Court included as part of the general measures that the applicants

[767] Rule 23 (a) Federal Rules of Civil Procedure (US), 20 December 1937, http://uscode.house.gov.
[768] J. MEYER-LADEWIG in "Discussion Following the Presentation by Luzius Wildhaber" in R. WOLFRUM, U. DEUTSCH, *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, International Workshop, Heidelberg, December 2007, 81.
[769] ECtHR decision, *Załuska and Rogalska v. Poland*, application nos. 53491/10 and 72286/10, 20 June 2017, §§ 48 and 52.
[770] ECtHR, *Vassilios Athanasiou et autres v. Greece*, application no. 50973/08, 20 December 2010, § 58.

of the pending applications do not need to go back to the domestic system to receive compensation. Instead, the state is obliged to offer them redress within a certain time-limit on an ad hoc basis. With this, the Court means that the compensation must be offered either through a national compensation scheme or through a friendly settlement procedure at the Court.[771] This case must be seen as an in-between solution, both aimed at lessening the burden for the Court as well as to provide a solution to the victims within a fixed period of time.

Flexibility with respect to case management will subsequently also form part of this chapter. Rule 61 of the Rules of Court explains that an adjourned case can be re-opened at any time 'where the interests of the proper administration of justice so require'. Re-opening of adjourned cases has happened before, for example after the non-execution of Ivanov-type cases.[772] It is however not clear whether this is the only reason for the Court to re-open cases. The respondents at the Court were thus asked which situations would qualify for a re-opening of cases.

6. vulnerability

Work Package 5 of the Human Rights Integration Project hypothesized a link between the vulnerable status of potential applicants to their having difficulty to access the courts. Following this logic, this doctoral research attempted to incorporate this dimension into the research. As will be shown below however, the empirical research conducted suggests that vulnerability is not necessarily of special importance in the context of the pilot judgment procedure.[773]

Vulnerability is a concept that is both universal as particular. All human beings are inherently vulnerable but they experience this inert vulnerability each individually.[774] Looking first at the universal conception of vulnerability, harm and suffering play a central role. All human beings, as vulnerable subjects, are inherently susceptible to harm in its many varieties.[775] This can include bodily, moral, psychological, economical and institutional sufferings.[776] The particular conception of vulnerability acknowledges the different positions persons can take in their environments and the differing perceptions of their vulnerability.[777] Important in this context is

[771] ECtHR, *Gerasimov and others v. Russia*, application nos. 29920/05, 3553/06, 18876/10, 61186/10, 21176/11, 36112/11, 36426/11, 40841/11, 45381/11, 55929/11, 60822/11, 1 July 2014, § §§230-232; a similar solution can be found again later in the Rutkowski judgment ECtHR, *Rutkowski and others v. Poland*, application nos. 72287/10, 13927/11 and 46187/11, 7 July 2015, § 228.

[772] These similar adjourned cases were re-opened as a response to the fact that the Ukraininan government had still not executed the previous pilot judgment of Yuriy Nikolayevich Ivanov v. Ukraine; for more information see ECtHR, *Burmych and others v. Ukraine*, application nos. 46852/13 et al., 12 October 2017, §§ 23-27.

[773] A further discussion of vulnerability and the pilot judgment procedure based on the empirical data can be found from page 171 on.

[774] L. PERONI, A. TIMMER, "Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law", *International Journal of Constitutional Law*, 2013, 1058.

[775] A. TIMMER, " A Quiet Revolution: Vulnerability in the European Court of Human Rights", in M. FINEMAN, A. GREAR (eds.), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, Ashgate, 2013, 148.

[776] L. PERONI, A. TIMMER, "Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law", *International Journal of Constitutional Law*, 2013, p; 1058.

[777] L. PERONI, A. TIMMER, "Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law", *International Journal of Constitutional Law*, 2013, p. 1059; A. TIMMER, " A Quiet Revolution: Vulnerability in the European Court of Human Rights", in M. FINEMAN, A. GREAR (eds.), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, Ashgate, 2013, p; 155.

that vulnerability is truly a relational concept since it looks at the individual in his/her social context.[778]

The European Court however, does not look at the concept of vulnerability in this sense. It does not regard every human being as inherently vulnerable, but attaches this characteristic in its case law to particular individuals or groups.[779] Unfortunately, the Court is not always consistent in doing so.[780]

On the one hand, the European Court has considered applicants as vulnerable, specifically on the basis of their membership to a vulnerable group. Members of these groups are then automatically regarded as vulnerable by the Court. The concept of a vulnerable group first emerged with the case of *Chapman v. The United Kingdom*, when the Court labelled the applicant as belonging to a vulnerable group, the Roma. The vulnerability of Roma emerges from their minority status and historically discriminatory behaviour directed towards them.[781] Later on, the Court broadened the list of vulnerable group to include persons with mental disabilities,[782] people living with HIV,[783] and in certain cases asylum seekers.[784] The Court has however not developed a clear set of characteristics of what constitutes a 'vulnerable group'. Peroni and Timmer have distilled three common denominators, based on a close reading of the case law of the court. Firstly, vulnerability is considered relational. The Court thus recognized the vulnerability of an individual as being influenced by their environment, consisting of societal, historical or institutional structures.[785] The person is vulnerable because of his/her being part of a vulnerable group.[786] Secondly, the Court accounts vulnerability as particular. A vulnerable person is a "*group member whose vulnerability is shaped by specific group-based*

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[778] L. PERONI, A. TIMMER, "Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law", *International Journal of Constitutional Law*, 2013, p. 1060; A. TIMMER, " A Quiet Revolution: Vulnerability in the European Court of Human Rights", in M. FINEMAN, A. GREAR (eds.), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, Ashgate, 2013, p; 155.

[779] L. PERONI, A. TIMMER, "Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law", *International Journal of Constitutional Law*, 2013, p. 1060; A. TIMMER, " A Quiet Revolution: Vulnerability in the European Court of Human Rights", in M. FINEMAN, A. GREAR (eds.), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, Ashgate, 2013, p; 152.

[780] A. TIMMER, " A Quiet Revolution: Vulnerability in the European Court of Human Rights", in M. FINEMAN, A. GREAR (eds.), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, Ashgate, 2013, p. 155.

[781] ECtHR, *Chapman v. UK*, Application no. 27238/95, 18 January 2001, § 96; ECtHR, *Aksu v. Turkey*, Applications nos. 4149/04 and 41029/04, 15 March 2012, §. 44; L. PERONI, A. TIMMER, "Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law", *International Journal of Constitutional Law*, 2013, p. 1063.

[782] ECtHR, *Keenan v. UK*, Application no. 27229/95, 3 april 2001, §; 38.

[783] ECtHR, *Kiyutin v. Russia*, Application no. 2700/10, 10 March 2011, §; 64; ECtHR, *I.B. v. Greece*, Application no. 552/10, 3 October 2013, §; 81.

[784] *M.S.S. v. Belgium and Greece*, Application no. 30696/09, 21 January 2011, §; 232; ECtHR, *Tarakhel v. Switserland*, Application no. 29217/12, 4 November 2014, §. 118; A. TIMMER, " A Quiet Revolution: Vulnerability in the European Court of Human Rights", in M. FINEMAN, A.GREAR (eds.), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, Ashgate, 2013, p. 153.

[785] L. PERONI, A. TIMMER , "Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law", *International Journal of Constitutional Law*, 2013, p. 1064.

[786] L. PERONI, A. TIMMER, "Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law", *International Journal of Constitutional Law*, 2013, p. 1064.

experiences".[787] Thirdly, the Court characterizes vulnerability as being intrinsically linked to harm. The Court has identified different patterns of harm in its case law, such as prejudice and stigmatization, social disadvantage and material deprivation.[788]

On the other hand, the Court has regarded individual applicants as vulnerable, independent of the group that they belong to. The Court has established in its case law that persons in detention are put in a vulnerable position due to the fact that they are put under State control.[789] Next, it has found applicants vulnerable because of their status of victim – of domestic abuse,[790] sexual offences,[791] or trafficking[792] - or because of their gender, [793] or their sexual orientation[794]. Furthermore, the Court has established that persons who are in a situation of a legal power imbalance are put in a vulnerable position. This includes persons who are accused of criminal charges and persons who lack legal capacity.[795] Lastly, the Court has considered children as inherently vulnerable in a number of cases.[796]

In some pilot cases, the Court mentioned the vulnerable status of the applicants involved. Logically, in pilot cases concerning violations of article 3 of the Convention the Court has brought up the vulnerability of the applicants involved. Mostly, the Court has mostly attributed vulnerability to detainees, either as a group or individually . In the cases of *Torreggiani* and *Rezmives*, the Court mentioned the vulnerability of detainees in general as they find themselves under the control of the State.[797] The Court also raised the particular vulnerability of detainees with mental illnesses in the case of *W.D.*.[798] In *Neshkov* however, although it was a case concerning detainees, the Court only marked one of the applicants as particularly vulnerable

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[787] L. PERONI, A. TIMMER, "Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law", *International Journal of Constitutional Law*, 2013, p. 1064.
[788] L. PERONI, A. TIMMER, "Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law", *International Journal of Constitutional Law*, 2013, p. 1065.
[789] ECtHR, *Salman v. Turkey,* Application no. 21986/93, 27 June 2000, §; 99; ECtHR, Centre for Legal Resources on Behalf of Valentin Câmpeanu v. Romania, application no. 47848/08, 17 July 2014, §. 131; A. TIMMER, " A Quiet Revolution: Vulnerability in the European Court of Human Rights", in M. FINEMAN, A. GREAR (eds.), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, Ashgate, 2013, p; 154.
[790] ECtHR, *Eremia v. Republic of Moldova*, application no. 3564/11 , 28 May 2013.
[791] ECtHR, *Sandru v. Romania,* application no. 33882/05, 15 October 2013.
[792] ECtHR, *Breukhoven v. Czech Republic*, application no. 44438/06, 21 July 2011.
[793] ECtHR, *Opuz v. Turkey*, application no. 33401/02, 9 June 2009, §§ 132 & 160; ECtHR, *Bevacqua and S v. Bulgaria,* application no. 71127/01, 12 June 2008, §. 65; ECtHR, *Hajduova v. Slovakia*, application no. 2660/03), 30 November 2010, §. 46; ECtHR, *Eremia v. Republic of Moldova*, 3564/11 , 28 May 2013, §. 73; ECtHR, *B.S. v. Spain*, application no. 47159/08, 24 July 2012, § 71; A. TIMMER, " A Quiet Revolution: Vulnerability in the European Court of Human Rights", in M. FINEMAN, A. GREAR (eds.), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, Ashgate, 2013, p. 155.
[794] ECtHR, *Schalk and Kopf v. Austria,* Application no. 30141/04, 24 June 2010; ECtHR, *Smith and Grady v. UK*, application nos. 33985/96 and 33986/96, 27 September 1999, §; 90.
[795] ECtHR, *Salduz v. Turkey*, application no. 36391/02, 27 November 2008, §. 54; ECtHR, *Zehetner v. Austria*, application no. 20082/02, 16 July 2009, §; 63.
[796] ECtHR, *Mubilanzila Mayeika and Kiniki Mitunga v. Belgium*, application no. 13178/03, 12 October 2006, §; 51; ECtHR, *Z. and Others v. UK*, application no. 29392/95, 10 May 2001, §. 73; ECtHR, *M.C. v. Bulgaria*, application no. 39272/98, 4 December 2003, §. 58 and 183.
[797] ECtHR, *Torreggiani and others v. Italy*, application nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 et 37818/10, 8 January 2013, §§ 65 and 72 ; ECtHR, *Rezmiveş and others v. Romania*, application nos. 61467/12, 39516/13, 48231/13 and 68191/13, 25 April 2017, § 72.
[798] ECtHR, *W.D. v. Belgium*, application no. 73548/13, 6 September 2016, § 106.

due to his disability and the fact that he was still subjected to the harsh prison conditions. This prompted the Court to order specific individual measures with respect to this applicant.[799] The case of *Kuric v. Slovenia*, concerned a group of applicants who had become stateless following the dissolution of Yugoslavia. The Court stressed that these applicants were in a situation of vulnerability and insecurity which was not appropriately compensated by the State.[800]

The case of *Burdov (no.2)* however carries special importance here. The case concerned the non-execution of domestic judgments ordering payment of compensation or social benefits. The Court stated that this wide-spread problem affected not only victims of the Chernobyl disaster but also other large groups of Russian population, including in particular some vulnerable groups.[801] The Court made this comment in the section where it investigated whether there existed a practice incompatible with the Convention, in order to find that the issue itself was structural and warranted the use of the pilot judgment procedure. The use of the vulnerability language in this part of the judgment could thus indicate that the Court takes the status of the involved applicants into account when deciding to apply the procedure. As a result, the question concerning the implications of vulnerability for the pilot judgment procedure was included in the interviews, both at the Court as with the applicants' representatives and human rights NGOs.

D. The experiences at the side of the applicants: does the pilot judgment procedure affect the right to individual petition?

The elements of access to justice as conceptualized in the framework of this dissertation, were subsequently used in the interviews both with Court personnel as well as in the interviews with the applicants' lawyers and representatives of human rights NGO's. Their experiences will be outlined in this sub-chapter, following the structure set out above.

1. Access to clear legal information

Rule 61 already clarifies that there is a difference in the kinds of communication given to the applicants in the pilot case and those in the similar pending cases. Therefore, the communication with respect to both categories of applicants will be discussed separately.

a. With respect to the applicants in the pilot case

The respondents explained that the Court communicated in a similar fashion in the pilot case as in standard individual cases.[802] When the Court communicates the case to the Government, it also sends a letter to the applicants in order to ask for further submissions. This letter contains a number of questions for the parties to answer. These questions already show the direction in which the Court is going to analyse the case. With a pilot case, the Court includes a question in this communication where it asks the parties to submit information to the Court as to whether the facts of the case reveal the existence of a structural problem which could be linked to other

[799] ECtHR, *Neshkov and others v. Bulgaria*; application nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, 27 January 2015, §§ 292 and 302.
[800] ECtHR, *Kurić and others v. Slovenia*, application no. 26828/06, 26 June 2012, § 412.
[801] ECtHR, *Burdov v. Russia (no. 2)*, application no. 33509/04, 15 January 2009, § 133.
[802] Interview I dd 20.01.2017; Interview II dd 20.01.2017; Interview II dd 13.01.2017; Interview dd 1.03.2017; Interview dd 16.03.2017; Interview dd 22.02.2017; Interview II dd 23.02.2017.

analogue applications.[803] This indicates that the Court is planning to apply the pilot judgment procedure and the applicants are thus invited to submit their views on this. One respondent mentioned that the Court also included some general information concerning Rule 61 in the original communication letter.[804] Another stated that the Court includes a short description of what the pilot judgment procedure is.[805] An interviewee at the side of the Court submitted that the applicants receive a letter setting out the procedure, which also explains what will happen to them and what they need to do.[806] Another respondent at the Court however stated that the Court does not provide any explanation concerning what the procedure entails and what the consequences are.[807]

Some interviewees remarked that they thought this question was directed primarily towards the government.[808] As a result, one respondent did not submit any information concerning the systemic nature of the issue at hand, mostly because that is a lot of work and this task was attributed to the NGO backing the case. [809] Another tried to include as much information as possible to show that the problem was indeed systemic: complaints by others in a similar situation but also parliamentary documents, documentaries and newspaper articles.[810]

A group of the respondents on the side of the applicants questioned the language used by the Court in its communication with the applicants. One respondent criticized the language used in the communication of the Court as not adapted to laymen. This person stated that the Court is communicating with applicants as if all of them have an attorney who is skilled with respect to the procedure before the European Court of Human Rights. This person did not see any kind of specific effort on the side of the Court to make sure that the parties understand what is going on.[811] Others stated that the communication is very - and even extremely - formal and must thus be translated for the clients.[812] Yet another explained that this information is not intended for the applicants but for the legal representatives.[813] Two interviewees even posed that the Court's judgments in and of themselves are not meant for the applicants involved. They are about the abstract theory of human rights but not about the real situation of the people, it does not bring support for their situation. As a result, these respondents indicated that this is the reason they do not bring more case before the Court, because "*it's not good for the people*".[814] As to the

[803] For instance see the communication in *W.D. v. Belgium*: ECtHR, *W.D. v. Belgium*, communication, App. No. 73548/13, 26 March 2015.
[804] Interview I dd 21.03.2017.
[805] Interview I dd 23.02.2017.
[806] Interview III dd 13.01.2017.
[807] Interview dd 9.01.2017.
[808] Interview dd 1.03.2017; Interview dd 22.02.2017.
[809] Interview dd 1.03.2017. The role of human rights NGOs in these cases will be discussed more thoroughly below under "The role of NGO's in pilot judgments: third party interventions and NGO representation." Starting from page 174.
[810] Interview dd 16.03.2017.
[811] Interview dd 9.03.2017.
[812] Interview dd 2.03.2017; Interview II dd 21.03.2017.
[813] Interview I dd 23.02.2017.
[814] Interview II dd 21.03.2017.

language used in the communication from the Court, the lawyers and NGO representatives are thus playing an intermediate role in the Court's communication with the applicants.

This is not the only instance where they are intermediaries. In a number of interviews, the lawyer involved explained that the information between the Court and the applicants arrived at their address.[815] So, not only the use of formal language, but the manner of distributing the information as well puts the lawyers in this intermediary role. This thus makes that the lawyer plays an important part in the level of understanding of the applicant of what is happening in their case. One respondent at the Court clarified that the level of understanding will depend on the lawyer: "*If you have a specialized lawyer in the field of European human rights, than yes, I would say that he or she understands very well what is happening*."[816]

This intermediary role not only makes the lawyer very important, it can also put the lawyers and NGO representatives in a difficult position. One respondent narrated what happened when some of the victims were included in the case and others weren't. The ones that were included and finally managed to get compensation were indeed tremendously happy at the time. The interviewee however indicates that it was very difficult to communicate this to one of the victims who was not included. It was difficult to explain to this person what the problem was in their case. They did not understand and the respondent thinks the organization was blamed for the failure in that case by the victim involved.[817] Another respondent talked about working with persons with mental disabilities and how it is extremely difficult to get information from the Court across to this group of applicants. In some instances, such applicants become angry towards their lawyer because they do not understand what the lawyer is actually doing. Deontology in this instance requires the lawyer to act in the best interests of the client, regardless of whether this client fully understands what is precisely happening.[818]

b. With respect to the applicants in similar pending cases

It might be argued that it is only pertinent that the applicants in the analogue pending cases are informed when their cases are being adjourned.[819] However, the Court sometimes decides to not communicate similar cases as a case-management tool. This results de facto in adjournment, while there is no indication in Rule 61 about whether the Court needs to inform these applicants about their decision to stay communication. One interviewee here indicated that it's only when there is an official adjournment that the applicants are informed.[820]

Rule 61 states that the applicants in the adjourned cases must be informed 'in a suitable manner'.[821] From the interviews at the Court, it has further become clear that there is no standard practice concerning the information provided to the applicants when their cases are officially adjourned. Many do not know how the court communicates with this group of

[815] Interview dd 9.03.2017; Interview dd 16.03.2017; Interview dd 22.02.2017.
[816] Interview dd 9.01.2017.
[817] Interview dd 9.03.2017.
[818] Interview dd 16.03.2017.
[819] Interview I dd 23.02.2017.
[820] Interview II dd 20.01.2017.
[821] Rule 61.2 of the Rules of Court.

applicants.[822] One interviewee at the Court indicated that the Court sends letters to the applicants in these cases that they should direct their cases to the new national remedy. If this fails, they can always come back.[823] An interviewee at the side of the applicants confirmed this and stated that the Court sometimes sends letters to the applicants of adjourned cases to inform them of the fact that their case is kept pending.[824]Another respondent at the Court merely indicated that these applicants are being notified by the Registry that their case is kept pending.[825] The manner or content of the information is unclear. The Court sometimes also puts up a notification on the website, both in the official languages of the Council of Europe – meaning English and French – and the official language of the involved State.[826] One respondent at the Court clarified that the Court generally puts up such a notification on its website and does not inform these applicants individually. This respondent however stated that their division made the decision to write letters to all applicants whose cases would be adjourned. However, it would be difficult to find all these applicants as they might have changed locations – a concern which was real seeing the characteristics of the group of victims involved – or might not have a lawyer. Consequently, the division decided to issue a press release in English and the official language of the involved State. The press release was then made available on the website of the Court and the government of the involved country was requested to circulate it, also among the relevant authorities. It was thus up to the government to help spread the information. This interviewee clarified that there was a lot of discussion about how the applicants would be informed and that this was something they felt uncomfortable about.[827] Furthermore, when applicants are informed that their cases are sent back to the domestic system, they are instructed to again submit their claim there.[828]

Due to their intermediary role, there is a possibility for the involved lawyers to explain to the larger group of victims what is happening. One of the respondents at the side of the applicants explained that, together with the involved NGO, they organized an information session for the group of victims involved. This group was larger than the applicants of the case at the Court. This person specifically said that these sessions were consultations. The lawyers discussed with the attendees what was going on, what the issues were, what they were going to argue before the Court and what the possible outcomes were. This respondent stated that this created a sort of link between the representatives at the Court and the victims at large.[829] This kind of strategy

[822] Interview anonymous I; Interview I dd 18.01.2017; Interview dd 9.01.2017
[823] Interview II dd 17.01.2017.
[824] Interview I dd 21.3.2017.
[825] Interview II dd 13.01.2017.
[826] Interview dd 9.01.2017; Interview III dd 13.01.2017.
[827] Interview III dd 16.01.2017.
[828] Interview I dd 23.02.2017; This is for instance the case now with the judgment of Burmych and others v. Ukraine in which the Court decided to absorp the pending 12000+ cases into the execution process of the pilot case of *Yuriy Nikolayevich Ivanov v. Ukraine*. The information notice for the applicants of these cases is given at the website of the Court, under the Department of the Execution of Judgments. The website, which is also translated in Ukrainian and Russian, can be accessed here: https://www.coe.int/en/web/execution/-/burmych-and-others-v-ukraine.
[829] Interview I dd 21.3.2017.

is however only possible when there is a clearly defined group of victims which is manageable in size in order to organize such consultations.

2. Friendly settlements and unilateral declarations

a. How friendly settlements work at the Court.

The interviews clarified that friendly settlements are not as friendly as the name might suggest. It is rather a fast-track procedure for the Court. In the vast majority of cases, there is no negotiation between the parties. Instead, the Registry submits a proposal to the applicants involved which includes the amount of compensation they could be awarded based on established case law. The State also receives a letter in which the established case law is explained and the same proposition is thus made. This proposal is sent to the parties already at the communication of the case.[830] If successfull, the Court can strike out the case[831] without having to be very elaborate on the facts and the reasoning of a case. It is in essence a win-win-win situation for all parties involved.[832] It must however be emphasized that this situation applies when the case has already been communicated to the State. Friendly settlements in cases which have not yet been communicated result in confidential decisions. They are not made public, contrary to friendly settlements in cases which have already been communicated.[833]

With respect to pilot judgments, there are several possibilities for friendly settlements. In some pilot cases, the Court reserves the issue of just satisfaction for determination at a later date. This might then result in a friendly settlement, like in the *Broniowski* case for example.[834] In other instances, the Court did not reserve the issue of just satisfaction and has thus already decided on the compensation for the applicants in the pilot case. In these instances, the similar cases might be solved by friendly settlement. These friendly settlements can occur either on an individual basis or collectively.[835] The State can however also try to foster a solution nationally, without the involvement of the Court's Registry. This would then mean that there are indeed national negotiation proceedings based on a previous pilot judgment. If this succeeds, the Court will then subsequently strike out these cases.[836]

b. Experience within the Court

Within the Court, there are varying viewpoints concerning the use of friendly settlements and unilateral declarations in the context of pilots. Firstly, there is the pragmatic viewpoint. These respondents were in favour of the use of friendly settlements to alleviate the work load for the Court because procedurally, these cases result in strike-out decisions.[837] On the other side of the spectrum, there are the more principled viewpoints. One interviewee stated that friendly settlements and unilateral declarations should not be allowed in the context of a pilot case

[830] Interview I dd 23.02.2017.
[831] This strike-out happens on the basis of article 39 ECHR.
[832] Interview anonymous I; Interview II dd 17.01.2017.
[833] Interview II dd 17.01.2017.
[834] ECtHR, *Broniowski v. Poland* (friendly settlement), application no. 31443/96, 28 September 2005.
[835] Interview dd 9.01.2017.
[836] Interview anonymous I. This strike-out will then happen on the basis of article 37 of the ECHR.
[837] Interview II dd 17.01.2017; Interview I dd 18.01.2017; Interview I dd 20.01.2017;

because this would be an easy way out for the government and the underlying problem would remain.[838] Another explained that friendly settlements are not an option in cases finding a violation of the prohibition of inhuman and degrading treatment as this provision is of such great importance.[839]

There are however a whole array of considerations which portray a more nuanced regard for the use of friendly settlements and unilateral declarations in pilots. One interviewee explained that friendly settlements would only be successful if the government cooperates. If the government is indeed fixing the underlying systemic problem and it is not possible to repatriate the pending cases, friendly settlements can help solve the issue. But if there is no solution, this respondent clarified that the Court still accepts unilateral declarations although these will then continue forever: "*As long as you don't deal with the root cause of the problem it makes no sense to go on delivering judgments, or settling. It relieves the Court of the numbers becoming huge but it is not an ultimate solution*."[840] Another stressed that friendly settlements can only be allowed if the State has taken measures which guarantee that the systemic problem will not come back again to the Court. The Court should first satisfy itself that it is not in effect confronted with a situation of on-going non-execution of the pilot judgment, where adequate general measures have not been taken by the respondent government within a reasonable time.[841] One interviewee put the emphasis on the applicants involved, stating that it's important to have the applicants' approval.[842]

Unilateral declarations were not thoroughly discussed in the interviews at the Court. They were primarly portrayed as back-up solutions to friendly settlements. Firstly, one respondent clarified that they also are only accepted by the Court when they include the State's solution for the systemic element.[843] Another interviewee explained that they could help in situations where the applicants are not reasonable.[844]

c. Experiences at the side of the applicants

Unsurprisingly, friendly settlements are not regarded very positively from the perspective of the applicants' lawyers and NGO's. One respondent clarified that they can be a way for the governments to sweep issues under the carpet. The governments avoid a judgment on the merits which might be more high profile. They can only be useful where governments really cooperate, admit they know the problem and subsequently solve it.[845] Another mentioned that the government might not be willing to accept a friendly settlement but set up a national

[838] Interview I dd 13.01.2017.
[839] Interview II dd 16.01.2017.
[840] Interview III dd 13.01.2017.
[841] Interview anonymous II.
[842] Interview II dd 18.01.2017.
[843] Interview I dd 17.01.2017.
[844] Interview dd 19.01.2017.
[845] Interview II dd 23.02.2017.

compensation scheme instead. As the follow-up decision *Stella* has showed[846], States can award lower compensations nationally than they would be required to pay by the Court.[847]

3. Fair procedures and due process

a. Voice

The focus of the research concerning voice was on two stages in the proceedings: first at the Court and later at the Committee of Ministers.

i Voice at the Court

Firstly, the applicants' possibilities for manifesting their voice before the Court was examined. Due to the intermediary role of lawyers, applicants need to get their voice heard through them. The lawyer in turn thus has a responsibility towards his or her clients in order to get these voices across to the Court. The question however remains how this process takes form and which voices take preference.

Some lawyers already make a selection of the cases that they bring to the Court, be it alone or in cooperation with an affiliated NGO. One respondent explained that the case started with a group of activists who was trying to persuade a team of lawyers to bring their case before the Court. The lawyers indeed accepted to do this pro bono and gave the group some information as to which articles of the Convention could be involved. The lawyers further instructed the activists to collect as many stories as possible, they would select the cases which had the biggest chances of winning. In practice that meant a group of applicants varying in age and problems but who together sketched the width of the problem very well.[848] Another interviewee stated that they consult with the applicants who would want to be the lead applicant. They then put the name of this person first in the application, in the hopes that the Court will indeed select this person. According to this respondent, it does not matter for the Court who is the lead while it matters for the applicants.[849] Lawyers also sometimes group cases themselves.[850]

The selection of the case is already made with a certain goal in mind. When this stage is over, lawyers build their case building towards this same goal. In order to engage the applicants at the Court, it is not only necessary to have a stream of information coming from the lawyers to the applicants as discussed under "Access to clear legal information". Information must also be transferred from the applicants to the lawyers to ensure the inclusion of the applicants' viewpoints. Most lawyers thus build their case in consultation with their clients.[851] Even when communication is difficult with the client, one respondent stated that there is always a discussion concerning all aspects of the case. There is no point in fooling the client. However, some types of clients are not capable to help build strategy, in which case the lawyer must act

[846] ECtHR, decision, *Stella and others v. Italy*, application no. 49169/09, 16 September 2014.
[847] Interview I dd 21.03.2017.
[848] Interview dd 9.03.2017.
[849] Interview I dd 21.03.2017.
[850] Interview I dd 23.02.2017.
[851] Interview dd 1.03.2017; Interview dd 16.03.2017; Interview dd 2.03.2017; Interview dd 22.02.2017; Interview II dd 23.02.2017.

in the best interests of his or her client.[852] Another respondent submitted that it is important to explain to the clients what the proposed strategy is, but also potential constraints and chances for reasonable success. This respondent has found that in most cases applicants agree. However, when they do not agree, this respondent has also dropped certain legal remedies.[853] When working with applicants who are also activists in their own right, it is imperative to build strategy together with the applicants. These kinds of applicants have substantial knowledge of the problem and can help with constructing the argument and providing evidence of the systemic problem.[854] Lastly, when the lawyer is affiliated to an NGO who also submitted a third party intervention, an interviewee explained that the applicants were consulted with respect to their case but not with respect to the content of the third party intervention.[855]

Only one interviewee stated not to strategize with the victims.[856] Another explained that in the pilot case, strategizing was not done together with the applicants, although this was because there was language barrier between them which made communication especially difficult. Building strategy was however done with the human rights NGO involved, which played a bridge role between the lawyers and the applicants.[857] This was confirmed by a respondent who has also worked in other cases with applicants who lived far away and where there was a language barrier. In such cases, it is impossible to have the regular communication needed for this purpose. However, it is possible to work with local NGO's who can bridge this gap.[858]

ii Voice at the Committee of Ministers

Secondly, applicants in principle do not have the opportunity to present any information concerning the larger issue before the Committee of Ministers. Furthermore, applicants in the adjourned cases, when they are later sent back to the domestic system, never come into contact with the Committee of Ministers.[859] As will be explained below, participation at the level of the Committee of Ministers is mostly the prerogative of human rights NGO's involved behind the scenes in these cases.[860] They are able to submit information concerning the execution of the general measures in a given country and, when the case indeed has an NGO backing it, this organization can then interfere. Two of the respondents at the side of the applicants explained how this scenario can take place in reality. One of the examples is elaborated on in the following-subchapter. Here, a large outside organization organized informal meetings parallel with a human rights meeting at the Committee of Ministers in order to inform the representatives there about the execution process. During these sessions, the NGO closest to

[852] Interview dd 16.03.2017.
[853] Interview dd 22.02.2017.
[854] Interview II dd 23.02.2017.
[855] Interview I dd 23.02.2017.
[856] Interview dd 2.03.2017.
[857] Interview dd 9.03.2017.
[858] Interview II dd 23.02.2017.
[859] This is the case when their cases are sent back domestically. When their cases are handled through the WECL procedure or via friendly settlement/unilateral declaration, they will ultimately come into contact with the Committee of Ministers.
[860] This point was made by an Interviewee who has previously been involved in cases at the Court both as a lawyer as well as a representative of an NGO; Interview dd 22.02.2017. This point will be revisited more in-depth "Strategy before the Committee of Ministers." Starting from page 176.

the victims of the large-scale violation was invited to provide more background information and to represent the victims' viewpoints there.[861] Secondly, another interviewee talked about how the involved organization – which submitted a third party intervention and provided the lawyer to represent the applicant in the case at the Court – also submitted information to the Committee of Ministers. The Council of Europe further had a project on the large-scale issue running in that specific country. The representatives of the organization were also included in the start-up of that project by providing information on the case and talk about the implications of it.[862]

b. Consistency and bias suppression

Respondents at the Court were asked about their parameters for choosing to apply the pilot judgment. Their answers however have been included in the first chapter outlining the pilot judgment procedure in general.

What must be remembered in the context of consistency is that there are no fixed parameters for the application of the procedure. There are instead a number of factors influencing this decision: the number of incoming petitions, the principle of subsidiarity, the applicants' interests and most importantly the level of cooperation of the State involved. However, these factors are not communicated so that there are no certain rules on which the applicants can rely in order to know whether their case would qualify for the pilot judgment procedure, what evidence to bring to argue for or against and what the consequences are. One of the interviewees at the Court stated in this regard that "*[y]ou can't expect one hundred per cent coherence and consistency; you can't expect perfection. You should stand back and look at the general flow*."[863]

It must equally be emphasized however that Rule 61 includes the possibility for the applicants themselves to ask for the application of the procedure. From the interviews at the Court however, it seems that this has not happened yet.[864] None of the lawyers representing the applicants further indicated that they had specifically asked for the application of the pilot judgment procedure. One of the respondents at the Court stated in this regard to be disappointed that applicants have not used this possibility to ask for the application of the pilot procedure themselves.[865]

c. Accuracy

Accuracy in this thesis concerns the information on which the Court bases itself to decide to apply the pilot procedure. This in turn creates transparency for the applicants on how they can argue the systemic nature of their case before the Court and which sources they should reference.

The interviews with the applicant's representatives show that in some instances, there is close cooperation with a human rights NGO who is then tasked with writing such a third party

[861] Interview dd 9.03.2017.
[862] Interview II dd 23.02.2017.
[863] Interview anonymous II.
[864] Interview I dd 17.01.2017; Interview I dd 16.01.2017.
[865] Interview I dd 16.01.2017.

intervention directed at showing the court the wider context of the issue at hand. When there is no human rights NGO cooperation however, lawyers tend to use other sources in order to show the systemic character of the problem. One interviewee included new paper articles, reports from the national parliament and a documentary to evidence the wide-spread nature of the issue.[866] Another decided to gather testimonies on how the problem had impacted the victims, not only from the applicants in the case at hand but also from the larger group of victims.[867]

From the interviews at the Court, it seems that providing the Court with a large amount of information from a wide array of sources is effective in showing the systemic nature of the issue at hand, as well as working together with a human rights NGO. Below, the importance of third party interventions is elaborated on.[868] However, the interviews indicated that the Court indeed draws information from varying sources. No evidence is inadmissible before the Court. Accessible public information is thus used.[869] One respondent at the Court referenced newspaper articles as a source.[870] Another stated that the Court rather relies on general information available, meaning reports from NGO's and the CPT instead of on information from the parties. This respondent however did not frame this as distrust towards the parties but rather as an assumption that the parties would not have an interest in sketching the broader context.[871]

d. Correctability

Only two respondents at the Court have provided a clear answer concerning the question whether there are options for the applicants involved in pilot cases to argue against a certain outcome which they deem incorrect. With respect to the applicants in the pilot case, they have the same options as in other cases. This means that they can request to have their case entertained by the Grand Chamber. However, if the case started at the Grand Chamber, there is no real option to have the case re-examined. With respect to the applicants in the adjourned cases, one interviewee stated that "they have to trust the Court".[872] There is thus nothing to be done.

e. Ethicality

One interviewee at the Court stated that the Court accepts lesser amounts of compensation awarded nationally because that means that the pending cases are dealt with quickly. However, the amount must still be in proportion to the issue at hand.[873] Another stated that due to the pilot judgment procedure, there is always a remedy provided for all the victims involved. The Court is due to its limited capacity in human and other resources not able to render judgments on

[866] Interview dd 16.03.2017.
[867] Interview dd I dd 21.03.2017; Interview dd 9.03.2017.
[868] This will be discussed under "Role of human rights NGOs for the Court: providing context" from page 178 on.
[869] Interview II dd 17.01.2017.
[870] Interview II dd 16.01.2017.
[871] Interview anonymous I.
[872] Interview II dd 17.01.2017; Interview 9.01.2017.
[873] Interview II dd 18.01.2017.

thousands and thousands of the same cases. At least with the pilot procedure, there is a remedy.[874]

At the side of the applicants, one of the interviewees talked about a clear discrimination between those applicants whose cases were examined under the pilot judgment and all the others. This respondent argued that it was a clear discrimination because there is no reason given why those who are picked by the court as being the lead plaintiffs in a pilot judgment should receive more than the others.[875] There was however a more pragmatic view a well. One of the lawyer stated that indeed the compensation was lower at the national level, but that this was not an issue since the amounts of compensation awarded in Strasbourg were too high anyway. If the client would ask to bring a case to complain about the compensation being lower than in Strasbourg, this respondent would do so although principally, the amount is objectively speaking sufficient.[876]

Moral considerations with respect to not adjourning similar pending cases, evidenced both in the case law as well as in the empirical research, have been elaborated on above.[877]

f. Representation

The Court tries to select one or more cases that are representative of the issue at hand. The interviews at the Court have however clarified that there are no fixed internal rules on how to ensure representativeness of the chosen case or combination of cases. The lawyers of the Court thus select these cases based on their own assessment of the situation at hand, undoubtedly assisted by the information provided to them by the lawyer in the first application. However, the empirical research suggests that the focus at the Court is on the issue rather than on the person behind the application. Factors taken into account are whether the case exemplifies the underlying issue well, whether the applicant is represented, whether the case was important on the national level, whether the systemic issue is at the heart of the complaint, whether the applicant in the case submitted a qualitative application, etc. One of the applicants' representatives speculated that the Court chose a specific case because it was a clear cut case concerning the systemic issue. It did not present any side issues, so it was easy to handle.[878] Factual elements of the case are thus not specifically taken into account.

On the side of the applicants' representatives the interviews have shown that they sometimes do a pre-selection of the case or cases to bring to the Court. In performing this selection, they are employing different criteria. One respondent explained that cases were selected based on their increased chance of winning because they contained facts which are easier to prove.[879] Another stated that they let the applicants decide who wants to be lead plaintiff.[880] Others do not make a selection before taking the case to Strasbourg. If multiple victims come, one interviewee stated that they group the cases and let the Court decide which one to select.[881]

[874] Interview III dd 13.01.2017.
[875] Interview I dd 21.03.2017.
[876] Interview dd 1.03.2017.
[877] Under "Ethicality" starting from page 153.
[878] Interview dd 1.03.2017.
[879] Interview dd 9.03.2017.
[880] Interview I dd 21.03.2017.
[881] Interview I dd 23.02.2017.

Another systematically sent every application to Strasbourg with the aim of showing the Court that the issue was not individual or accidental.[882]

Some respondents also had a double role: either they represented both the lead applicants as well as applicants in adjourned cases or they were affiliated with an NGO dealing with the broader issue through which there was contact with the larger group of victims. One respondent explained that the involved NGO collected testimonials from the larger group of victims staying behind in order to both write the third party intervention as well as to help shape the arguments before the Court.[883] Another one of these lawyers mentioned the other applicants after the communication of the pilot case in order to argue the systemic nature of the issue. This interviewee further was not particularly negative towards the adjourning of the other cases pending the taking of general measures. It already takes a considerable amount of time for a case to take its course through the system of the Court. It does not really make a big difference if they have to wait until there is a judgment or they have to wait to hear that they need to return to a national remedy in order to get compensated.[884]

4. Appropriate case-management

Most respondents at the Court did not have a real example in mind where the Court would opt to reopen the proceedings in adjourned cases in the interests of justice. The factual situation of an applicant might warrant the reopening of a case. One respondent thought about a situation where an applicant might be of old age and the Court would decide to examine the case so that this person might still see a judgment and find a remedy.[885] Another stated that if an applicant would be in pre-trial detention in bad conditions, this would be an ideal situation to continue the case.[886] The possibility to have an adjourned case re-opened further works as a safety measure which enables the Court to reopen cases when the measure set up by the State in execution of a pilot judgment is deemed ineffective, or when the individual measures promised in a friendly settlement procedure are not executed afterwards.[887] One respondent at the Court described it as a catch-all provision meant to give some room to the Court as it is not possible to see or anticipate what is happening on the national level.[888]

Others talked about the cases that were stayed after the *Ivanov* pilot, where the examination of cases was opened after it became clear that the involved State was not executing the judgment. This respondent explained that these cases needed to be revitalized because some of them were brought to Strasbourg ten or more years ago and it is not appropriate to wait anymore. [889]

[882] Interview dd 16.03.2017.
[883] Interview 9.03.2017.
[884] Interview dd 16.03.2017.
[885] Interview III dd 13.01.2017.
[886] Interview I dd 17.01.2017.
[887] Interview I dd 18.01.2017; Interview I dd 20.01.2017.
[888] Interview II dd 13.01.2017.
[889] Interview I dd 18.01.2017; Interview III dd 13.01.2017.

5. Vulnerability

a. Pragmatic correlation between vulnerability and the pilot judgment procedure – viewpoint from the side of the Court

The interviews at the Court have clarified that there is no direct link between the pilot judgment procedure and vulnerability. It can thus not be argued that the Court uses the pilot procedure to target situations disadvantageous particularly to persons belonging to vulnerable groups.

Firstly, the interviews confirmed that there was no clear definition of the concept of vulnerability at the Court. Many respondents, also on the side of the applicants, mentioned that the concept is susceptible to interpretation.[890] One respondent even stated that there is a lively debate going on within the Court concerning vulnerability, referring to the dissent of judge Sajó in the judgment of *M.S.S. v. Greece and Italy*.[891]

Secondly, many respondents at the Court answered bluntly that the pilot judgment procedure has no connection to the vulnerable status of the applicants.[892] A large part of respondents at the Court linked vulnerability and the pilot judgment procedure in the sense that both cause the involved case to be treated under priority treatment.[893] One respondent in this context stated that vulnerability is relevant when priority is involved, so when a case would be accorded a lower priority level if not for the vulnerability of the applicants. As the pilot judgment procedure does the same, there is thus not really a point in doing this.[894]

There were however some answers which attempted to clarify the relationship between vulnerability and the pilot judgment procedure to a higher degree. One respondent at the Court clarified how the vulnerable status of the applicants would come into play when it comes to deciding to apply the pilot procedure. On the one hand, vulnerability would plead against applying it if this would result in the adjournment of similar cases. This is because, according to this respondent, it is not possible to freeze article 2 and 3 cases, as well as article 8 cases when women and children are concerned. On the other hand, the respondent explained that the vulnerable status of the applicants might make the Court more keen on giving a clear message in article 2 and 3 cases and thus decide for applying the procedure. In this situation, the Court would then group the cases in order to deliver justice for all involved in one judgment. The respondent however concluded by stating that vulnerability is not an element taken into consideration by the Court when deciding to apply the pilot procedure.[895]

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[890] At the side of the Court : Interview II dd 17.01.2017; Interview anonymous I; Interview II dd 16.01.2017; Interview dd 09.01.2017. At the side of the applicants: Interview dd 22.02.2017; Interview II dd 23.02.2017.

[891] ECtHR, *M.S.S. v. Belgium and Greece*, application no. 30696/09, 21 January 2011 . In his partly concurring, partly dissenting opinion judge Sajó stated that he did not regard the group of asylum-seekers to be a particularly vulnerable group per se. He argued that asylum-seekers are far from being a homogenous group, if a group at all. Some or many asylum-seekers may be vulnerable, but it is not an attribute inherent to the group as such.

[892] Interview I dd 13.01.2017; Interview II dd 1301.2017; Interview III dd 13.01.2017; Interview anonymus I; Interview II dd 16.01.2017; Interview dd 19.1.2017.

Interview II dd 17.01.2017; Interview I dd 16.01.2017; Interview II dd 20.01.2017;

[894] Interview I dd 16.01.2017.

[895] Interview I dd 18.01.2017.

Another respondent stated that there might indeed be a correlation between the vulnerable status of the applicants and the use of a pilot in their case. This however is just a correlation, due to the nature of cases that the Court has before it, not due to a conscious choice by the Court to employ the procedure to the benefit of this specific group of applicants. This respondent explained that the targeted large-scale issues often entail issues touching upon article 3. Since the concept of vulnerability is close to the rights protected under article 3, it is logic that vulnerability sometimes comes with this.[896] The respondent further stated that the vulnerable status of the applicant might in some cases trigger the Court to already decide on the issue concerning just satisfaction in order to speed up the process for this applicant.[897] This would thus be contrary to the practice in Broniowski, where the issues under article 41 were reserved at first and later solved by friendly settlement.

This respondent was not alone in seeing this correlation between the use of the pilot procedure and the vulnerable status of the involved applicants. Another respondent also opined that this was due to the kinds of cases that the Court is dealing with based on articles 2 and 3. However, this respondent placed this in the context of prioritization from a different, more pragmatic, angle. The priority policy at the Court dictates that it must handle its cases in an order where the most vulnerable applicants come first and where the core articles are put in hierarchy as well.[898] Based on this policy, this respondent clarified that the Court has decided to first deal with the cases involving these core issues and thus encompassing the most vulnerable applicants. The respondent suggested that the Court stumbled upon these issues and found systemic problems. There is thus no philosophy behind it.[899]

b. Strategic choice for vulnerability – viewpoint from the side of the lawyers and human rights NGO's

Lawyers and representatives of human rights NGOs explained that sometimes they did use the concept of vulnerability as a strategic tool. This however was discussed in a broader context, away from the pilot judgment procedure.

One respondent explained that the lawyers and the human rights NGO involved selected the most vulnerable persons in the larger group to bring their cases before the Court. They further made sure that the group was diverse, showing a whole range of ages, family situations and thus varying vulnerabilities. This selection was done particularly to make the poignant situation of this group of persons more tangible through the facts and to show the whole scope of the issue in the case. When this case eventually went to the Grand Chamber, this NGO raised funding in order to bring these applicants to Strasbourg to attend the hearing. The respondent stated in this context that there was no translation available for the victims and they were seated in the audience as there is no seating for them with the lawyer. The organization made sure that these victims were in the first row so that the judges could see the suffering that they went

[896] This respondent was not alone in placing this correlation, this was also mentioned in Interview II dd 20.01.2017.
[897] Interview I dd 20.01.2017.
[898] These core articles are articles 2 – the right to life, 3 – the probition of torture and inhuman or degrading treatment and 5§1 – the right to liberty and security.
[899] Interview II dd 20.01.2017.

through. The lawyer then read a little bit about every applicant and they raised their hand when they were spoken of.[900]

Others emphasized the importance of highlighting the vulnerable position of the applicants so that the threshold for the application of article 3 is lower. Vulnerability leads to a specific kind of protection and maybe to a specific way of applying the conditions of an article 3 claim.[901] One respondent here stated that it's not only about the facts. Sometimes the article is applicable because of the vulnerable status of the applicants.[902]

Another respondent explained that their organization uses vulnerability as a factor in deciding whether to take on a case or not. This because of the substantive nature of the issue and thus the need to offer help, as well as with respect to access to justice as vulnerability negatively affects access: "other people perhaps have more capacity to get legal advice and therefore we should focus on the people who are more vulnerable in that sense."[903]

In conclusion, it thus seems that both sides agree that vulnerability is not a factor in the pilot judgment procedure.

E. The role of NGO's in pilot judgments: third party interventions and NGO representation.

In analysing the case law, it became clear that human rights NGOs were represented in a considerable amount of cases involving a systemic human rights issue, whether these cases resulted in full pilots, quasi-pilots or cases merely mentioning the existence of a structural problem.[904] As will be explained in this sub-chapter, human rights NGO's do have an important role to play when it comes to access to justice. Some of these organizations engage in strategic litigation for this reason. In the context of pilots, the empirical data suggests that they can further play a central role in informing the Court about the systemic nature of the issues at hand.

1. NGO involvement as third parties or as lawyers

NGO involvement can procedurally take up two forms. The most evident way for an NGO to involve itself in a case before the Court is by submitting a third party intervention. According to article 36 of the Convention, the President of the Court may invite any State which is not party to the proceedings or any person concerned who is not the applicant to submit written comments or to take part in the hearings.[905] In practice, this provision is used by organizations to request leave to the President in order to submit amicus curiae briefs, thereby providing

[900] The specific Interview will not be referenced here, as it might entail identifying information.
[901] Interview dd 2.03.2017; Interview dd 16.03.2017.
[902] Interview dd 2.03.2017.
[903] Interview II dd 23.02.2017.
[904] Of the 28 full pilots, 4 cases had one or more NGOs submitting a third party intervention and 4 cases involved a lawyer with an affiliation to a human rights NGO. Of the 19 quasi-pilots: two cases had NGO third party interventions and 3 involved a lawyer with NGO affiliation. Of the 11 cases involving a systemic issue without a procedural consequence, 4 had NGO third party interventions and 4 involved a lawyer with human rights affiliation. For specific information on which cases involved which organizations, see Annexes 7 to 9 detailing the occurance of NGO involvement respectively in full pilots, quasi-pilots and cases mentioned. The respondents at this side of the spectrum were further selected on the basis of this information.
[905] Article 36 ECHR.

theoretical or contextual information to the Court in the hope of inspiring its deliberations on the case at hand. In most cases, NGO's who have a specific expertise in the subject matter of a certain case want to intervene in order to share their contextual knowledge with the Court. There are roughly two kinds of third party interveners.[906] There are the repeat-players such as Open Society Justice Initiative, European Human Rights Advocacy Centre (EHRAC) and Amnesty International who intervene regularly.[907] So-called "one-shotters" on the other hand intervene only once in a specific case. An example of this is the Association for the Protection of Foreign-Currency Savers in Bosnia and Herzegovina, an organization which intervened in the case of *Suljagic v. Bosnia and Herzegovina*.[908] It must be emphasized however that third party interventions can only be allowed by the Court after the case has been communicated to the State. The first step must thus be taken by the applicants and their lawyers.

NGO's are however also involved in pilot cases on a different level. In some situations, the applicant in the chosen pilot case was represented by a lawyer affiliated or working together with a human rights organization. For the full pilot cases of *Ananyev, Kuric, Neshkov and Rutkowski*, this was the case.[909]

2. Role of human rights NGOs in securing access to justice

a. NGO's and access to justice

Two of the interviewed applicants' lawyers who are affiliated to a human rights organization explicitly linked their work to access to justice. They explained that NGO's indeed focus on the systemic nature of the issue and its widespread impact. However, they contend that by doing so, they work for the most vulnerable part of the involved population: the persons who do not have the capacity to bring claims before a court, let alone to go to Strasbourg and submit an application to an international court.[910]

One of these respondents explained that such an organization does have an aim of bringing cases strategically. The respondent explained that this meant using the human and other resources of the organization to the best effect. If the case indeed ends up changing the law, the impact is greater than one that just secures victory for the individual applicant. This interviewee then put the situation of the involved organization in contrast to the work of private lawyers. Contrary to these private lawyers, an organization can work in cases where people would not be able to afford such a lawyer.[911] Another put the work of an NGO in context and stated that they never work in a vacuum. When NGO's are involved, this normally means that there is a

[906] N. BÜRLI, *Third-Party Interventions before the European Court of Human Rights*, Intersentia, 2017, 6.
[907] It could be argued that the Ghent University Human Rights Centre is a repeat-player as well; See the website of the Human Rights Centre of Ghent University here: http://www.hrc.ugent.be/third-party-interventions/#1493480334529-9b942f5b-d56f.
[908] ECtHR, *Suljagic v. Bosnia and Herzegovina*, application no. 27912/02, 3 November 2009.
[909] See Annex 7 "VI-d Detailed overview of full pilot cases - focus on the perspective of the applicants (June 2004 - June 2017)" starting from page 227.
[910] Interview II dd 23.02.2017 ; Interview dd 09.03.2017.
[911] Interview II dd 23.02.2017.

structural problem on which they have an expertise and on which they have collected evidence and documents.[912]

b. Strategic litigation before the Court

Two respondents explained that the pilot judgment procedure is an interesting strategic tool which can lead to substantial reform in law and administrative practice.[913] It could thus be used specifically for strategic litigation by human rights NGO's. Strategic litigation can be defined as a "form of public interest litigation where a case is pursued on behalf of an applicant or group of applicants, with a view to achieving a law reform goal beyond the individual case. While legal ethics dictate that the clients' interests are paramount in litigation, strategic litigation seeks an additional social or political impact beyond the remedy sought by the individual."[914]

When these organizations either bring the case to Strasbourg themselves or when they work in tandem with a lawyer, they make a first selection of the case. Several respondents explained that NGO's have limited resources, forcing them to make conscious decisions concerning which cases to bring to Court.[915] They select the cases which shed light on a bigger underlying issue or show particularly severe facts.[916] Sometimes, when several cases reveal a similar fact pattern, they already group these cases.[917]

In some cases, lawyers and involved NGOs are working closely together behind the scenes. In one situation where there was coordination between the lawyer and the NGO involved, the lawyer did not submit information concerning the systemic nature of the issue at hand but focused instead on the specific situation of the client. Sketching the context in which this individual applicants' rights were violated was left to the work of the NGO involved. This was a clear coordination of tasks between the two actors.[918] In another case, the driving force was the NGO while the lawyer representing the applicants in the pilot case was not directly affiliated with the organization. The NGO selected the lawyer based on prior knowledge of the Convention system and provided background information concerning the domestic political situation and facts about the applicants involved. Furthermore, the NGO organized information sessions with the lawyer open to all persons of the involved victim pool, in order to both provide information to other victims as well as to gather information for the case at the Court. The human rights organization thus worked as a bridge between the lawyer and the group of applicants.[919]

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[912] Interview dd 09.03.2017 ; This idea was also brought up in Interview II dd 23.02.207 and Interview dd 02.03.2017
[913] Interview I dd 23.02.2017; Interview II dd 23.02.2017.
[914] A. COOMBER, "Strategically litigating equality – reflections on a changing jurisprudence", 15 *European Anti-Discrimination Law Review*, 2012, 11. Andrea Coomber was then Legal Director of the NGO Interights and had formerly headed the organization's equality litigation before the ECtHR, among others.
[915] Interview dd 22.02.2017; Interview dd 1.03.2017; Interview II dd 23.02.2017.
[916] Interview dd 1.03.2017.
[917] Interview II dd 23.02.207; Interview I dd 23.02.2017;
[918] Interview dd 1.03.2017.
[919] Interview dd 09.03.2017.

It is important to emphasize that the respondents on the side of lawyers and NGO's do not think that there is a specific strategy to trigger the application of the pilot judgment procedure.[920] NGO's however, by their very nature, focus on large-scale issues and sometimes strategically select a case or a group of cases to bring to the Court. As one respondent explained: "it's all about the case." There is no clear-cut information available concerning which criteria the Court uses to select a case for pilot treatment. Furthermore, even if a 'perfect' case is brought, it can still merely result in an article 46 case. As a result, an NGO can only focus on the cases to be brought to the Court. If the NGO wants to trigger the procedure, they will bring a case which fits into it. The organization further needs to think about how to show that the problem is indeed systemic: reference to earlier case law, bring evidence that the problem is embedded in the law itself, etc. This is a point thus where lawyers, NGO's and applicants can work together.[921]

c. Strategy before the Committee of Ministers.

Applicants and their representatives can only submit information concerning the execution of individual measures and just satisfaction to the Committee of Ministers. NGO's on the other hand are able to provide the Committee with information concerning the execution of general measures. As a result, strategic litigation sometimes also results in a strategy before the Committee of Ministers.

One respondent explained the involved human rights organization submitted information as to execution to the Committee of Ministers as well. Furthermore, they were supported by a big organization, both financially as strategically. This supporting organization organized unofficial hearings for interested members of the Committee of Ministers to which the smaller NGO was invited. The hearings identified the main cases on which something was to be said in terms of execution. Experts, NGOs and representatives of victims were then asked to participate in order to explain to the Committee how the implementation was going from their perspective and what other measures would still be needed. As a result, the Committee kept the execution of this specific case on the agenda for several sessions, maintaining pressure on the State to execute properly.[922] Another respondent further explained that the case before the Court had the intention of having a violation found and securing compensation for the chosen applicants. The process before the Committee of Ministers on the other hand is much broader and is geared towards fostering change for the whole group of similarly situated applicants.[923]

d. Nuancing the occurence of strategic litigation in pilot and pilot-like cases.

Strategic litigation is something linked to human rights NGO's and it must be emphasized that many respondents were not affiliated to NGO's. Furthermore, regardless of NGO affiliation, many did not employ tactics of strategic litigation nor were they convinced about the need for it. As a result, many of the lawyers did not have any affinity to the concept. As one respondent put it: "it's not an American lawyer movie." This respondent did not believe in strategic

[920] The fact that there is no strategy was expressly mentioned in Interview dd 22.02.2017; Interview II dd 23.02.2017; Interview dd 1.03.2017;
[921] Interview II dd 23.02.2017.
[922] Interview dd 09.03.2017.
[923] Interview I dd 21.03.2017.

litigation and opined that if the application is well written, the case will be good and will lead to result.[924]

All respondents, including lawyers not affiliated to an NGO, do strategize in a way about their case and the underlying issues, although that does not necessarily mean they employ tactics of strategic litigation. They do this either by indeed working with an NGO, or with selecting a case specifically because it shows the precarious situation of the targeted group, by grouping large pools of similar cases, by attempted to communicate with the larger group of involved victims, by bringing large groups of similar cases individually to the Court, by talking to domestic politicians, by writing newspaper articles or even academic articles concerning the case, etc.[925] It is a minority of the interviewees who strategically select cases and build their case with the express motivation to foster change in the home country through litigation at the Court.

Some of the lawyers had their own tactic in order to get the issue on the agenda of the Court, without calling it a strategy. These lawyers mostly had an expertise with respect to a certain group of applicants and were in the position to bring a considerable amount of similar cases. Overwhelming the Court with the same cases over and over again was their way of showing the systemic nature of the issue, in both cases without knowing that the pilot judgment procedure even existed. Furthermore, they employed this tactic – first domestically and later at the Court - as a means to test a certain way of working and when this did not have the expected result, the next case could benefit from the lessons learnt.[926] This way, the Court was – maybe unknowingly - de facto working as a teacher in order to create expertise with these lawyers concerning a specific issue.

Indeed, a lot of the interviewed lawyers and NGO representatives were surprised that their case became a pilot or a quasi-pilot judgment. They either did not know about the existence of the procedure,[927] or were not expressly arguing to have their case decided using the pilot template.[928] One respondent called the case an ‘accidental pilot judgment’ explaining that the initiative came entirely from the Court.[929]

3. Role of human rights NGOs for the Court: providing context

This observation leads to another important role for human rights NGO’s in the context of pilot judgments. At the Court, many respondents were in favour of NGO’s submitting third party interventions in order to provide background information to the Court concerning the structural nature of the issue at hand.[930] One respondent even stated that these third party interventions

[924] Interview dd 1.03.2017.
[925] Interview II dd 23.02.2017; Interview II dd 21.03.2017; Interview I dd 23.02.2017; Interview I dd 21.03.2017; Interview dd 16.03.2017; Interview dd 2.03.2017; Interview dd 22.02.2017; Interview 9.03.2017; Interview dd 1.03.2017.
[926] Interview dd 9.03.2017; Interview dd 16.03.2017.
[927] Interview dd 16.03.2017; Interview dd 22.02.20174; Interview I dd 21.03.2017.
[928] Interview II dd 21.03.2017; Interview 9.03.2017; Interview dd 1.03.2017; Interview I dd 23.02.2017.
[929] Interview dd 1.03.2017.
[930] Interview I dd 13.01.2017 ; Interview II dd 13.01.2017 ; Interview III dd 13.01.2017; Interview anonymous I; Interview I dd 18.01.2017; Interview dd 09.01.2017; Interview dd 23.02.2017.

are relatively more important in pilot cases as the applicant lawyer is in most cases focused on the specific situation of the individual applicant. So, if the Court wants to gather information concerning the nature of the issue at hand, these third party intervention can indeed provide the necessary context.[931] One respondent stated in this sense that it is useful to have a different, external perspective from an organization working in the field.[932]

These third party interventions might also form part of a larger strategy. As discussed, in some cases there was coordination between lawyer and NGO where the third party intervention served as added information helping both the individual applicant as the informing the Court concerning the bigger issue in order to prompt a violation pertaining to the problem in general.[933]

It must be emphasized that none of the respondents at the Court indicated that the involvement of an NGO through the affiliation of a lawyer is a consideration taken into account when deciding on applying the procedure. To the contrary, two respondents at the Court explicitly mentioned that the involvement of an NGO is not a reason for the Court to pick a certain situation or case for the pilot judgment procedure.[934] Some respondents however explained that the quality of the submissions of the lawyer representing the applicant might indirectly be a factor taken into account when choosing the pilot case.[935] The Court more generally uses the information provided by the parties as a basis to show that the problem is indeed systemic.[936] A lawyer associated with an NGO might be able to place the individual case in its broader context and offer more qualitative submissions showing context which the Court can use to render a pilot judgment.

F. Conclusion: does the pilot judgment procedure hinder the right to access to justice?

1. Access to clear legal information

With respect to the applicants in the pilot case, the Court includes a question concerning the existence of a structural issue in the communication. There does not seem to be standard practice on what info is further annexed to the communication letter. Sometimes, the Court provides general information concerning Rule 61, other times not.

A finding which continuously came up during the interviews was the intermediary role of the lawyers and human rights NGO's involved in these cases. They need to translate for their clients, as the language used by the Court is very technical and formal. This leads to conclude that the lawyer is extremely important in the context of providing clear legal information for the applicants involved.

[931] Interview II dd 17.01.2017.
[932] Interview I dd 20.01.2017.
[933] Interview dd 9.03.2017; Interview I dd 23.02.2017.
[934] Interview I dd 20.01.2017 ; Interview dd 09.01.2017.
[935] Interview I dd 18.01.2017; Interview I dd 20.01.2017; Interview II dd 13.01.2017; Interview anonymous I; Interview II dd 16.01.2017.
[936] Interview I dd 20.01.2017 ;

With respect to the applicants in the similar pending cases, the kind of information provided depends on the procedural stage at which the Court has decided to stop the examination of the cases. If this happens before the case is communicated, this will be a de facto adjournment meaning also that these applicants don't need to be informed. If this happens after the communication of the case, this will be an official adjournment meaning that based on Rule 61, the applicants need to be informed 'in a suitable manner'. What this suitable manner entails however is not part of standard practice. Sometimes they receive letters. Other times, there is a notification on the Court's website. There can also be a press release which is distributed by the Court and the State involved.

2. Friendly settlements and unilateral declarations

Within the Court, there are different viewpoints concerning the use of friendly settlements and unilateral declarations ranging from pragmatic – meaning that they are encouraged because they alleviate the caseload - to principled – signifying that they should not be allowed because it is amoral. In between, there are nuanced perspectives as well, clarifying that the State must cooperate in executing the needed general measures before friendly settlements can be allowed or successful. A State's cooperation is necessary because otherwise there is the chance that the Court is left fighting a running battle. Unilateral declarations seem to be less standard in pilot cases.

Similarly at the side of the applicants, it is argued that friendly settlements are only useful when the State cooperates. The reason however is not so much tied up with procedural efficiency. The respondents on this side of the coin generally did not regard the use of friendly settlements as positive because this would be a means for the State to buy off its caseload and sweep its problems under the rug.

3. Fair procedures and due process

a. Voice

Here the lawyers and human rights NGO's are tasked with getting the applicants' voices across to the Court. They again play an important intermediary role. Firstly, they make a selection of the case or cases they bring to the Court. Further, they build their case in consultation with the applicants. Sometimes, they even strategize with them. If there are logistical issues, such as distance or language, local human rights NGO's can play a bridging role. If possible, these organizations do the same for the victims other than the applicants. If not, the voice of the other victims will thus not be part of the procedure before the Court. With respect to the procedure before the Committee of Ministers, the emphasis is mostly on the human rights NGO's involved.

b. Consistency and bias suppression

With regard to the decision to apply the pilot procedure, the interviews have clarified that there are no fixed parameters which the Court uses to make this decisions. There is further no consistency in the application of the procedure. The applicants however can ask for this themselves. Interestingly, none of the respondents at either side have indicated that this has happened.

c. Accuracy

The Court basis itself on a variety of sources in making the decision to apply the procedure. NGO's are tasked with writing third party interventions, which are of great help to the Court in order to outline the systemic nature of the issue. These third party interventions however only come after the decision to apply the pilot procedure. The lawyers representing the applicants rely on different sources: parliamentary documents, newspapers, testimonies, documentaries, etc. Whatever the source is, it is admissible before the Court and it is effective in evidencing the structural nature of the underlying problem.

d. Correctability

With respect to the applicants of the pilot case, they are afforded the same legal avenues as applicants in standard individual cases. The applicants in the similar pending cases however do not have a legal recourse when they want their case to be re-examined.

e. Ethicality

As to ethicality, it seems as if pragmatics reign both at the Court as at the side of the applicants. At the Court, the point was made that the Court is simply not capable of rendering judgment in all of these cases individually. There is thus the choice between no remedy at all, or the pilot procedure: "at least with the pilot procedure, there is a remedy". It is only in cases which involve core human rights issues, such as violations of article 3 that ethical principles play a vital role, for instance in the decision to not adjourn these cases.

At the side of the applicants, only one respondent took the principled view that the pilot procedure created a situation of discrimination between the applicant in the pilot case and the others.

f. Representation

Representation is a criterion which is especially important with respect to the selection of the pilot case. At the side of the applicants, some lawyers already did a pre-selection, either based on an increased chance of winning or on the will of the applicants involved. Other lawyers however did not do a pre-selection, some sent these applications as a group, others decided to bring every case individually to show the large-scale nature of the issue.

At the Court, there is again no standard practice as to how the pilot is selected. A myriad of selection criteria were uttered in these interview: whether the case exemplifies the problem well, whether the case was important at national level, whether the applicant is represented, whether the application was qualitative and whether the systemic issue is at the heart of the complaint.

4. Appropriate case-management

The possibility for the Court to re-open cases based on the interests of justice was found to be a safety measure when the State is not executing the requested general measures properly, or at all.

5. The intermediary role of the work of human rights NGOs and lawyers.

Human rights NGO's and lawyers clearly play an important part in securing access to justice for the applicants involved.

On the one hand, some NGO's are involved in strategic litigation which they link to access to justice. In this way, they aim to secure a solution for the most vulnerable within the victim population who would not bring a case to the Court or would not be able to afford a lawyer. They further want to foster change in the home State, which then secures a lasting impact for a larger group than the ones who were able to get to Strasbourg. The pilot judgment procedure was found to be an interesting tool for this purpose. This use of strategic litigation must however be nuanced as it is not something that is widely used amongst the respondents. There are many other ways however in which NGO's and lawyers strategize which does not involve strategic litigation: they might simply be working together with an NGO with expertise on the underlying issue, they write articles domestically in the context of putting attention on the issue or they may bring every single case to the Court in order to learn from the experience and get better judgments from the Court.

On the other hand, human rights NGO's might submit third party interventions to the Court whereby they provide context concerning the underlying systemic problem. The Court generally welcomes this information. It must however be emphasized that NGO affiliation of the lawyer is not a criterion used by the Court to select a case as the pilot.

V. The intersection of efficiency and accessibility: was the problem solved in reality?

The Court evaluates the efficiency of the pilot judgment procedure through the level of implementation of the general measures contained in it. In its *Stella* decision, the Court argued that the creation of the new domestic remedies in Italy were a direct result of the pilot judgment procedure. This in turn puts an end to the threat to the Court's machinery, previously posed by the large numbers of similar petitions coming from Italian prisoners. Moreover, the Court stated that this presented the affected persons with a means to obtain redress more rapidly.[937] Based on this wording by the Court, it can be argued that the Court sees the sufficient implementation of the pilot judgment as a positive development affecting both the efficiency of the Court and the situation of the applicants. The interviews at the Court confirm that it defines success in a pilot case as positive change in the country of origin.[938] Clearly, the Court primarily wants its judgments to be executed and thus for the problem to be solved domestically.

During the Oslo Conference on the long-time future of the Court, Başak Çali addressed the attendees on the research she undertook interviewing domestic stakeholders in the reform process.[939] These domestic stakeholders were domestic lawyers, domestic judges, parliamentarians who are not part of the Council of Europe's Parliamentary Assembly and domestic NGO's. This research showed that from a judicial, pedagogical perspective these repetitive cases are an interesting tool. The frequent, repetitive caseload helps judges to internalize the principles set by the Court. Furthermore, politicians are also more easily persuaded to reform when faced with a bulk of cases finding violations concerning the same issues.[940] She contended that repetitive case law is not necessarily a bad outcome, it is a constant, visible reminder that some States are failing to protect human rights. These repetitive cases have positive impact on the case law of higher courts and in the work of political and public institutions. According to Başak Çali , there is thus no need to revise the mission of the Court.[941]

It thus remains to be questioned whether these pilot judgments are indeed the most effective manner to solving the underlying issue, seeing Başak Çali's argument that repetitive case law helps the domestic stakeholders to appropriate the human rights principles of the Court. To this end, this chapter will firstly sketch the manner in which the Committee of Ministers and the Court respectively look into the level of execution of a pilot judgment (A.). Secondly, the Court's practice of assessing the domestic remedies set up after a pilot in follow-up decisions will be looked at (B.). Thirdly, the primordial factor of State cooperation will be focussed on in relation to the level of execution of a pilot case (C.). Lastly, this chapter will portray different

[937] ECtHR, decision, *Stella and others v. Italy*, application no. 49169/09, 16 September 2014, § 43.
[938] Interview I dd 17.01.2017; Interview I dd 16.01.2017; Interview I dd 13.01.2017; Interview II dd 16.01.2017.
[939] B. ÇALI, A. KOCH AND N. BURCH, *The Legitimacy of the European Court of Human Rights: the view from the ground*, Strasbourg, 2 May 2011.
[940] Conference on the long-term future of the European Court of Human Rights, Session I – History, reforms and remaining challenges, Oslo, 7 April 2014, 31-32.
[941] Conference on the long-term future of the European Court of Human Rights, Session I – History, reforms and remaining challenges, Oslo, 7 April 2014, 32-33.

viewpoints concerning what constitutes success in the context of the pilot judgment procedure (D.).

A. Monitoring of the State's execution of a pilot judgment

The Committee of Ministers is tasked with the monitoring of the execution of the Court's judgments. It invites the State for a regular check-up of the execution process and takes information from civil society organization concerning the general measures and from the applicants concerning the individual measures. Based on this, the Committee of Ministers then decides whether the matter has been resolved. A Resolution of the Committee of Ministers closing a case is thus the last stage of the process by which a State is held to adhere to the human rights obligations contained in the Convention.

The Court on the other hand makes a more abstract assessment of the domestic remedies taken by the States post pilot judgment by way of a decision in a selection of follow-up cases. The Court uses this assessment in order to relieve itself from the burden of the other similar cases. When the Court finds that the newly set up domestic remedy is effective, it can decide to strike out the remaining pending cases on the basis of article 37 ECHR in order to try this new remedy if it was made available retroactively to the cases already pending. If this domestic remedy is not found to be effective, the Court can still decide that the incoming similar petitions are inadmissible for non-exhaustion on the basis of article 35 ECHR of an effective domestic remedy.[942] In some cases however, the Court has already adopted a decision in which it has officially closed the pilot judgment procedure. The Court has done this because it was still receiving similar applications, which it then needed to process according to the two disposal methods mentioned here. These cases thus still signify a – albeit smaller – workload for the Court. The Court subsequently pronounced that it had fulfilled its task based on article 19 of the Convention: the domestic remedy set up after the pilot was deemed generally compatible and there is no longer a live Convention issue on which the Court has to pronounce itself. The Court in these instances decides that the pilot judgment procedure is closed and will thus not examine such cases anymore. The Court can still decide to entertain a case where the applicant had turned to the domestic remedy after which there is another human rights issue to be examined by the Court.[943] It does however not seem that officially closing a pilot judgment is standard practice, the Court might only decide to officially close pilot judgment proceedings when it is confronted with a continuing stream of incoming petitions.

Until end of October 2017, the Court has officially closed four pilot judgment procedures: *Broniowski*,[944] *Hutten-Czapska*[945], *Suljagic*[946] *and Kuric*[947]. In ten other pilots, the Court has found in a decision that the domestic remedy set up after the previous pilot judgment was an

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[942] Interview anonymous II.
[943] ECtHR, decision, *E.G. v. Poland and 175 other Bug River applications*, application nos. 50425/99 and 175 others, 23 September 2008, §§ 19-29.
[944] ECtHR, decision, *E.G. v. Poland and 175 other Bug River applications*, application nos. 50425/99 and 175 others, 23 September 2008, Point 2 of the Operative Part
[945] ECtHR, decision, *Association of Real Property Owners in Łódź and others v. Poland*, application no. 3485/02, 8 Mach 2011,
[946] ECtHR, decision, *Zadrić v. Bosnia and Herzegovina*, application no. 18804/04, 16 November 2010.
[947] ECtHR, decision, *Anastasov and others v. Slovenia*, application no. 65020/13, 18 October 2016,

effective remedy.[948] This is the case in the full pilot judgments of *Burdov (no.2) v. Russia, Olaru and others v. Moldova,, Rumpf v. Germany, Vasilios Athanasiou and others v. Greece, Finger v. Bulgaria, Dimitrov and Hamanov v. Bulgaria, Ümmühan Kaplan v. Turkey, Torreggiani and others v. Italy, Rutkowski and others v. Poland* and *Neshkov v. Bulgaria*.[949]

B. The Court's assessment of domestic remedies set up after a pilot

The Court does not have a general practice on how it assesses these new remedies afterwards. In some of these assessments, the Court makes a detailed overview of the new remedy, either in theory or in practice. In the four pilots which have officially been closed by the Court, the newly set up remedies were evaluated based on a thorough examination of both the text of the laws as well as the practice. The parties were also given the chance to answer questions concerning the new remedy and their argumentation is taken into account by the Court in the decisions.[950] In other evaluations of the remedies set up after pilots, the Court has also evaluated the practice rather than merely the theory.[951] In other cases, there was no practice yet to base the evaluation on but the Court took the time to thoroughly evaluate the text of the law and the interplay between different measures. The Court further looked at the action plans submitted by the involved State to the Committee of Ministers and took the monitoring decisions of the Committee into account in its own assessment. This kind of assessment has taken place in the decisions following the pilot cases of *Finger v. Bulgaria, Dimitrov and Hamanov v. Bulgaria*[952], *Torreggiani v. Italy*[953] and *Neshkov and others v. Bulgaria*[954].

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[948] See Annex 4 "VI-a Cases open or closed + level of cooperation of the State (June 2004 - June 2017)" on page 216 .

[949] Respectively in ECtHR, decision, *Nagovitsyn and Nalgiyev v. Russia*, application nos. 27451/09 and 60650/09, 23 September 2010; ECtHR, decision, *Balan v. Moldova*, application no. 44746/08, 24 January 2012; ECtHR, decision, *Taron v. Germany*, application no. 53126/07, 29 May 2012; ECtHR, decision, *Techniki Olympiaki A.E. v. Greece*, application no; 40547/10, 1 October 2013; ECtHR, decision, *Balakchiev and others v. Bulgaria*, application no. 65187/10, 18 June 2013; ECtHR, decision, *Uzun v. Turkey*, application no; 10755/13, 30 April 2013; ECtHR, decision, *Stella and others v. Italy*, application no. 49169/09, 16 September 2014; ECtHR decision, *Załuska and Rogalska v. Poland*, application nos. 53491/10 and 72286/10, 20 June 2017; ECtHR, decision, *Atanasov and Apostolov v. Bulgaria*, application nos. 65540/16 and 22368/17, 27 June 2017. The Court previously found the follow-up domestic remedy set up after Broniowski appropriate and sufficient in ECtHR decision, *Andrzej Wolkenberg and others v. Poland*, application no. 50003/99, 4 December 2007. It further seems that an assessment of the newly set up law in execution of the *Gerasimov* pilot judgment is underway. The Court decided in the case of *Prisekin and Prisekiny v. Russia* to allow the state's unilateral declaration and stated that it would wait for another case in which the applicants had tried the new remedy in order to evaluate it: ECtHR, decision, *Prisekin and Prisekiny v. Russia*, application nos. 30949/06 and 49965/06, 26 June 2017.

[950] ECtHR decision, *Andrzej Wolkenberg and others v. Poland*, application no. 50003/99, 4 December 2007, §§ 36 and 67-77; ECtHR, decision, *Association of Real Property Owners in Łódź and others v. Poland*, application no. 3485/02, 8 Mach 2011, §§ 82-89; ECtHR, decision, *Anastasov and others v. Slovenia*, application no. 65020/13, 18 October 2016, §§ 89-102.

[951] ECtHR, decision, *Nagovitsyn and Nalgiyev v. Russia*, application nos. 27451/09 and 60650/09, 23 September 2010, § 31; ECtHR, decision, *Techniki Olympiaki A.E. v. Greece*, application no; 40547/10, 1 October 2013, § 58.

[952] The general measures in execution of both pilot judgments were found effective in ECtHR, decision, *Balakchiev and others v. Bulgaria*, application no. 65187/10, 18 June 2013.

[953] ECtHR, decision, *Stella and others v. Italy*, application no. 49169/09, 16 September 2014.

[954] ECtHR, decision, *Atanasov and Apostolov v. Bulgaria*, application nos. 65540/16 and 22368/17, 27 June 2017.

There are however examples where the Court is more easily satisfied. In some cases, the Court merely takes the word of the State.[955] Here, the Court looks at the text of the laws put in place after the pilot case and states that they require the national judges to apply Convention standards in the domestic system. Whether that is de situation in practice is however not assessed. There is also no thorough examination of the interplay of different measures. The Court avails itself that the domestic measure is effective solely based on the fact that it refers to Convention standards. In these cases, the Court generally instructs the applicants to first test the vailable remedy. Such decisions have been taken in the aftermath of the pilot cases of *Olaru and others v. Moldova, Rumpf v. Germany and Ümmühan Kaplan v. Turkey*.[956] After the pilot case of *Rutkowski*, the Court found that the State had demonstrated 'an active and reliable commitment' to take the necessary general measures and proceeded to make a general overview of the measures already created by Poland. It subsequently allowed a series of friendly settlements along with a series of unilateral declarations where the applicants had not agreed to the State's proposed compensation amount because they argued that their specific circumstances justified a higher sum.[957] In the follow-up decision to the pilot case of *Suljagic v. Bosnia and Herzegovina*, the Court merely referred to the Committee of Ministers resolution that stated that the general measures requested in the pilot case *appeared* to have been taken. The Court subsequently stated that it did not need to depart from this conclusion and decided to close the pilot proceedings all together.[958]

Interestingly, in two cases the applicants complained that the State had indeed put up a compensation scheme in execution of the previous pilot. There was however no measure set up to addressing the actual problem and thus preventing the issue from coming up again. Contrary to what could be expected from a subsidiarity point of view, the Court did not deem this problematic. Indeed, a preventive measures was found by the Court to be the best solution. However, the State is afforded discretion to decide which measures should be introduced.[959] This kind of reasoning arguably shows that the Court, when forced to choose, is more concerned with keeping these cases away from its docket rather than having the State de facto resolve the underlying problem. With such a reasoning, efficiency is here even prevailing over subsidiarity.

C. State cooperation after the pilot: the execution stage

It has been argued multiple times that the cooperation of the State is of primordial importance in the context of the pilot judgment procedure. This cooperation is especially needed with respect to the execution of the pilot judgment, whereby the Court is alleviated of the burden to deal with the same issue over and over again and the applicants are effectively offered a solution

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[955] P.LEACH, "Tackling systemic human rights violations – the role of Pilot Judgments" in *Pilot Judgment Procedure in the European Court of Human Rights and the Future Development of Human Rights' Standards and Procedures – Third Informal Seminar for Government Agents and Other Institutions*, Kontrast, May 2009, 25-26.
[956] Respectively in ECtHR, decision, *Balan v. Moldova*, application no. 44746/08, 24 January 2012, §§ 18-19; ECtHR, decision, *Taron v. Germany*, application no. 53126/07, §§ 39-40; ECtHR, decision, *Uzun v. Turkey*, application no; 10755/13, 30 April 2013, § 62.
[957] ECtHR decision, *Załuska and Rogalska v. Poland*, application nos. 53491/10 and 72286/10, 20 June 2017.
[958] ECtHR, decision, *Zadrić v. Bosnia and Herzegovina*, application no. 18804/04, 16 November 2010.
[959] ECtHR, decision, *Nagovitsyn and Nalgiyev v. Russia*, application nos. 27451/09 and 60650/09, 23 September 2010, §§ 33 – 35; this reasoning was repeated in ECtHR, decision, *Balan v. Moldova*, application no. 44746/08, 24 January 2012, §§ 20 – 21.

on the domestic level. State cooperation after the pilot can be looked at on two levels: firstly, whether the State indeed executed the judgment and whether the State has done this witihin a reasonable time.

1. The level of execution of a pilot case

Specifically focussing on the cases in which the involved government had opposed the application of the pilot procedure, it must be said that a little under half of them have already been closed by the Committee of Ministers.[960] In sixteen of the full pilot cases the State objected to the use of the procedure. Of those sixteen cases, eight are fully closed following a final resolution of the Committee of Ministers.[961] It must also be stated that eight of the full pilot cases which have not yet been executed, are under four years old, the period of time on average needed for the implementation of a pilot judgment, including a final resolution by the Committee of Ministers.[962] Five of these young cases are also counted in the seventeen cases involving opposing States. That leaves a total of two cases involving States which did not agree with the application of the pilot judgment procedure and which have already taken more than the average time-frame to execute the judgment: the cases of *Yuriy Nikolaeyevic Ivanov v. Ukraine* and *Greens and M.T. v. UK.* Both of these however do not require complex general measures from the state involved.[963] Furthermore, the Committee of Ministers had previously expressed its disappointment concerning both States. With respect to Ukraine, the Committee in 2012 stated that it profoundly reproached that the pilot judgment was still not executed and urged the State to do so with the utmost urgency.[964] As evidenced in the Burmych case, the Ukrainian State is reluctant to execute causing an enormous influx of similar cases. The Court then decided to strike these cases out regardless and passed the buck to the Committee of Ministers in an attempt to foster a solution on the political level. Concerning the UK, the Committee in 2015 reiterated its serious concern about the on-going delay in removing the blanket ban on prisoners' voting rights.[965]

[960] It must be emphasized that stock-taking was done in June 2017. 13 of a total of 28 pilot cases have been closed by a Committee of Ministers' Final Resolution; See Annex 4 "VI-a Cases open or closed + level of cooperation of the State (June 2004 - June 2017)" starting from page 216.

[961] These are the cases of: *Glykantzi v. Greece, Michelioudakis v. Greece, Burdov (no. 2) v. Russia, Dimitrov and Hamanov v. Bulgaria, Finger v. Bulgaria, Hutten-Czapska v. Poland, Suljagic v. Bosnia and Herzegovina* and *Rumpf v. Germany*.

[962] This average execution time will be discussed below under "Late execution of a pilot case" on page 189.

[963] In *Yuriy Nikolayevich Ivanov v. Ukraine*, the Court obliged the state to put in place a domestic remedy capable of securing adequate and sufficient redress for the non-enforcement of domestic remedies; in *Greens and M.T.* the Court obliged the United Kingdom to do away with the blanket ban on prisoners' right to vote.

[964] Committee of Ministers, *Interim Resolution Execution of the judgments of the European Court of Human Rights – Yuriy Nikolayevich Ivanov against Ukraine and the Zhovner group of 389 cases against Ukraine concerning the non-enforcement or delayed enforcement of domestic judicial decisions and the lack of an effective remedy in respect thereof*, CM/ResDH(2012)234, 6 December 2012.

[965] Committee of Ministers, *Interim Resolution Execution of the judgment of the European Court of Human Rights – Hirst and three other cases against the United Kingdom*, CM/ResDH(2015)251, 9 December 2015.

V.1 FULL PILOT JUDGMENTS: STATE'S COOPERATION IN RELATION TO THE LEVEL OF EXECUTION

Name of the case	case closed for CoM?	time between judgments and CoM final resolution	time the case has been pending (until 30 June 2017)
Broniowski v. Poland	yes	5 years, 3 months	
Hutten-Czapska v. Poland	yes	10 years, 3 months	
Burdov (no. 2) v. Russia	yes	2 years, 11 months	
Olaru and others v. Moldova	no		7 years, 11 months
Yuriy Nikolaeyevich Ivanov. Ukraine	no		7 years, 9 months
Suljagic v. Bosnia and Herzegovina	yes	1 years, 7 months	
Rumpf v. Germany	yes	2 years, 3 months	
Maria Atanasiu and others v. Romania	no		6 years, 9 months
Greens and M.T. v. UK	no		6 years, 8 months
Vasilios Athanasiou and others v. Greece	yes	5 years	
Finger v. Bulgaria	yes	4 years, 4 months	
Dimitrov and Hamanov v. Bulgaria	yes	4 years, 4 months	
Ananyev and others v. Russia	no		5 years, 6 months
ümmühan Kaplan v. Turkey	yes	2 years, 9 months	
Michelioudakis v. Greece	yes	3 years, 8 months	
Kuric and others v. Slovenia	yes	3 years, 11 months	
Manushaqe Puto and others v. Albania	no		4 years, 11 months
Glykantzi v. Greece	yes	3 years, 2 months	
Torregiani and others v. Italy	yes	3 years, 2 months	
M.C. and others v. Italy	no		3 years, 10 months
Gerasimov and others v. Russia	no		3 years
Alisic and others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia	no		3 years
Neshkov and others v. Bulgaria	no		2 years, 5 months
Varga and others v. Hungary	no		2 years, 4 months
Rutkowski and others v. Poland	no		2 years
Gaszo v. Hungary	no		1 years, 9 months
W.D. v. Belgium	no		10 months
Rezmiveş and others v. Romania	no		2 months

Legenda: level of cooperation:
- Yellow: state opposed the application of the procedure
- no colour: state did not oppose the procedure
- pink: state welcomed the application of the procedure
- purple: the state recognized the structural nature of the problem.

Susi has earlier also stated that the Court might first come out with a leading case, in order to give an incentive to the State to tackle the issue. If the State does not do this within a reasonable

time-frame, he contends that the Court will then decide to adopt a pilot judgment procedure. [966] This idea seems to originate from the assumption that the success rate will be higher in case of a full pilot judgment, rather than with a quasi-pilot. The case of *Iacov Stanciu v. Romania* seems to confirm this theory. In its communication, the Court had indicated that it was contemplating to introduce the pilot judgment procedure in this case.[967] In the end, the Court made this a quasi-pilot case in which the Romanian government was arguing that the problem of sub-standard detention conditions was not a systemic one and that the Court was invited to deal with these applications on a case-by-case basis.[968] The State subsequently took some time to execute the judgment. The last Interim Resolution taken by the Committee of Ministers in this case was taken on 12 March 2015 and indicates the Deputies' concern surrounding the measures taken by the authorities. They specifically note that the legislative reforms instituted by the Romanian government would not alter the situation.[969] Consequently, the Court came out with a pilot judgment *Rezmiveş and others v. Romania*, in which it explicitly refers to the case of *Iacov Stanciu* and states that this was not properly executed more than four years after this first principled judgment.[970]

A similar dynamic took place with the *Torreggiani* judgment.[971] The Court had first come out with the judgment of *Sulejmanovic* in 2009, which was treated under enhanced procedure by the Committee of Ministers.[972] However, the Court came out four years later with the pilot judgment in *Torreggiani*, which was subsequently executed within 3 years.[973] Furthermore, looking at the case law, it can be generally stated that pilot judgments are more quickly executed. Of the twenty-two quasi-pilot cases pronounced between 2005 and 2016, a mere five cases have been closed through a Final Resolution by the Committee of Ministers.[974]

2. Late execution of a pilot case

Lambert Abdelgawad has however shown that non-compliance is generally not the problem. Late execution is a phenomenon which is more prevalent in pilots as well as in individual cases.[975] When looking at the full pilots again, States that have already executed the judgment

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[966] M. SUSI, "The Definition of a 'Structural Problem' in the Case law of the European Court of Human Rights Since 2010", *German Yearbook of International Law*, 2012, 412.
[967] ECtHR Statement of Facts and Questions to the Parties, *Iacov Stanciu v. Romania*, application no. 35972/05, 21 May 2010, Question 3.
[968] ECtHR, *Iacov Stanciu v. Romania*, application no. 35972/05, 24 July 2012, § 192.
[969] Committee of Ministers, *Interim Resolution concerning the Bragadireanu Group*, CM/Del/Dec(2015)1222/12, 12 March 2015, § 2.
[970] ECtHR, *Rezmiveş and others v. Romania*, application nos. 61467/12, 39516/13, 48231/13 and 68191/13, 25 April 2017, §§ 107-111.
[971] F. FAVUZZA, "*Torreggiani* and Prison Overcrowding in Italy", *Human Rights Law Review*, 2017, 153-173.
[972] ECtHR, *Sulejmanovic v. Italy*, application no. 22635/03, 16 July 2009.
[973] See Annex 4 "VI-a Cases open or closed + level of cooperation of the State (June 2004 - June 2017)" on page 216; Committee of Ministers, *Execution of the judgments of the European Court of Human Rights, Two cases against Italy*, CM/ResDH(2016)28, 8 March 2016.
[974] See Annex 4 "VI-a Cases open or closed + level of cooperation of the State (June 2004 - June 2017)" on page 216; a sixth case (M.S.S. v. Belgium and Greece) is only closed with respect to Belgium.
[975] E. LAMBERT ABDELGAWAD, *The execution of judgments of the European Court of Human Rights*, Council of Europe Publishing, 2008, 64. Concerning the reasons given in the literature for non-execution or late execution, see: E. LAMBERT ABDELGAWAD, *The execution of judgments of the European Court of Human Rights*, Council of

but originally objected to the application of the pilot judgment procedure don't seem to do this in a longer time-frame than is the case on average with respect to pilot cases.[976] Looking at the cases[977], the pilots which have now been executed have attained this status on average in four years. This is roughly the same average time-frame within which the pilots concerning opposing States were executed.[978]

Furthermore, most pilot judgments include in the operative part of the judgment a specific time-frame for the States to execute the general measures indicated by the Court. In a minority of cases the Court finds that the States must set up an action plan with the Committee of Ministers within a certain time-limit:

Europe Publishing, 2008, 64; G. Guillaume, Foreword of A. Azar, *L'exécution des decisions de la Cour Internatonale de Justice*, Bruylant, Droit International, Brussels, 2003, 291; PACE Resolution 1226 (2000) "Execution of judgments of the European Court of Human Rights".

[976] The comparison will only take place between pilot cases, as it is aimed at assessing the difference in execution time-frame depending on the cooperation level of the state, not depending on the procedure used.

[977] See "V.1 Full pilot judgments: State's cooperation in relation to the level of execution" on page 188.

[978] Although this is a very small sample, it also encompasses all full pilot cases.

V.2 FULL PILOT CASES: THE INDICATION OF TIME-LIMITS FOR GENERAL MEASURES

Name of the case	time-limit for general measures	time-limit for action plan with Committee of Ministers
Broniowski v. Poland	/	/
Hutten-Czapska v. Poland	/	/
Burdov (no. 2) v. Russia	x	/
Olaru and others v. Moldova	x	/
Yuriy Nikolaeyevich Ivanov. Ukraine	x	/
Suljagic v. Bosnia and Herzegovina	x	/
Rumpf v. Germany	x	/
Maria Atanasiu and others v. Romania	x	/
Greens and M.T. v. UK	x	/
Vasilios Athanasiou and others v. Greece	x	/
Finger v. Bulgaria	x	/
Dimitrov and Hamanov v. Bulgaria	x	/
Ananyev and others v. Russia	/	x
Ümmühan Kaplan v. Turkey	x	/
Michelioudakis v. Greece	x	/
Kuric and others v. Slovenia	x	/
Manushaqe Puto and others v. Albania	x	/
Glykantzi v. Greece	x	/
Torregiani and others v. Italy	x	/
M.C. and others v. Italy	/	x
Gerasimov and others v. Russia	x	/
Alisic and others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia	x	/
Neshkov and others v. Bulgaria	x	/
Varga and others v. Hungary	/	X
Rutkowski and others v. Poland	/	/
Gaszo v. Hungary	x	/
W.D. v. Belgium	x	/
Rezmiveş and others v Romania	/	x

In a lot of these cases, the Court merely orders the involved State to set up a domestic remedy within a certain time-frame.[979] This however seems to be more of a division of competences

[979] The Court did this in the cases of Neshkov v. Bulgaria; Dimitrov and Hamanov v. Bulgaria; Finger v. Bulgaria; Manushaqe Puto v. Albania; Maria Atanasiu and others v. Romania; Rumpf v. Germany, Ümmühan Kaplan v.

with the Committee of Ministers, as the Committee usually requires more from the State in order to address the underlying issue. In Neshkov for instance, the Committee requested the Bulgarian authorities to adopt reforms aimed at combatting prison overcrowding and poor material conditions of detention.[980] In the cases of *Finger* and *Dimitrov and Hamanov*, the Committee also ordered the State to take measures with a view to remedying the systemic problem of excessive length of proceedings, aside to the creation of a domestic remedy within the time-frame set up by the Court.[981] The same pattern emerged in the other cases where the Court merely made the obligation to put up a domestic remedy within a certain time-limit binding upon the State.[982] In an Interim Resolution concerning the case of *Burdov (no.2) v. Russia*, the Committee even referenced to specific paragraphs of the obiter dicta in the judgment where the Court talked about general measures which could remedy the underlying problem, but which the Court had not made binding in the operative part of the judgment.[983]

With respect to the time-limits set by the Court, the question raises whether these States have executed the required general measures within the time-frame set up by the Court.

Turkey; Glykantzi v. Greece; Michelioudakis v. Greece; Vassilios Athanasiou and others v. Greece; Yuriy Nikolayevich Ivanov v. Ukraine and Burdov (no.2) v. Russia.

[980] Committee of Ministers, *Decision Neshkov and others and Kehayov group v. Bulgaria Supervision of the execution of the Court's judgments*, CM/Del/Dec(2016)1250/H46-6, 8-10 March 2016.

[981] Committee of Ministers, *Decision DjaNGOzov, Kitov, Dimitrov and Hamanov, and Finger groups against Bulgaria*, CM/Del/Dec(2011)1228/6, 2 December 2011.

[982] See Committee of Ministers, *Decision Manushaqe Puto and others, Driza group against Albania*, CM/Del/Dec(2013)1186/1, 5 December 2013; Committee of Ministers, *Decision Ormanci group and Ümmühan Kaplan against Turkey*, CM/Del/Dec(2013)1164/31, 7 March 2013; Committee of Ministers, *Decision 50973/08 Athanasiou and others 70626/01 and Manios group 2531/02*, CM/Del/Dec(2011)1115/15, 8 June 2011; Committee of Ministers, *Interim Resolution Execution of the judgments of the European Court of Human Rights Yuriy Nikolayevich Ivanov and Zhovner group against Ukraine concerning the non-enforcement or delayed enforcement of domestic judicial decisions and the lack of an effective remedy in respect thereof*, CM/ResDH(2017)184, 7 June 2017.

[983] Committee of Ministers, *Interim Resolution Execution of the judgment of the European Court of Human Rights Burdov No. 2 against the Russian Federation regarding failure or serious delay in abiding by final domestic judicial decisions delivered against the state and its entities as well as the absence of an effective remedy*, CM/ResDH(2011)293, 2 December 2011.

V.3 EXECUTION OF A PILOT WITHIN THE SET TIME-LIMIT

Name of the case	date of judgment	time-limit indicated for general measures	General measures implemented?	date of implementation general measures	general measures executed within time-limit?
Burdov (no. 2) v. Russia	15/01/2009	6 months	yes	4/05/2010	no
Olaru and others v. Moldova	28/07/2009	1 year	no	/	no
Yuriy Nikolaeyevich Ivanov v. Ukraine	15/10/2009	1 year	no	/	no
Suljagic v. Bosnia and Herzegovina	3/11/2009	6 months	yes	already before the judgment came out! (21/03/2009 - 16/07/2010)	yes
Rumpf v. Germany	2/09/2010	1 year	yes	3/12/2011 (but CoM stated this was within the time limit)	yes
Maria Atanasiu and others v. Romania	12/10/2010	18 months	no	/	no
Greens and M.T. v. UK	23/11/2010	6 months	no	/	no
Vasilios Athanasiou and others v. Greece	21/12/2010	1 year	yes	Greece needed roughly five years to institute all needed measures	no
Finger v. Bulgaria	10/05/2011	12 months	yes	1/10/2012 and 15/12/2012	no
Dimitrov and Hamanov v. Bulgaria	10/05/2011	12 months	yes	1/10/2012 and 15/12/2012	no
Ümmühan Kaplan v. Turkey	20/03/2012	1 year	yes	several measures ranging from 5/07/2012 - 28/06/2014	partly
Michelioudakis v. Greece	3/04/2012	1 year	yes	20/02/2014	no
Kuric and others v. Slovenia	26/06/2012	1 year	yes	21/11/2013	no
Manushaqe Puto and others v. Albania	31/07/2012	18 monts	no	/	no
Glykantzi v. Greece	30/10/2012	1 year	yes	20/02/2014	no
Torreggiani and others v. Italy	8/01/2013	1 year	yes	27/06/2017	no
Gerasimov and others v. Russia	1/07/2014	1 year	yes	19/12/2016	no
Alisic and others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia	16/07/2014	1 year	yes	28/12/2016	no
Neshkov and others v. Bulgaria	27/01/2015	18 months	no	/	no
Gaszo v. Hungary	16/10/2015	1 year	no	/	no
W.D. v. Belgium	6/09/2016	2 years	no	/	?

In only two of the full pilot cases where the Court included a time-limit for the execution of the general measures did the States actually provide for these measures within this time-limit: in *Suljagic v. Bosnia and Herzegovina* and in *Rumpf v. Germany*. *Ümmühan Kaplan* was partly executed within the deadline. In many other however, the State merely exceeded the time-limit with a few months. Late execution thus is a problem with pilot judgments as well.

D. Varying viewpoints regarding success in pilot cases

A superficial examination of the newly created domestic remedies can arguably not provide the Court with sufficient guarantees that the previous pilot is in reality duly executed. Indeed an interviewee at the Court stated that the level of success of these cases was mixed. The cases of *Broniowski*, *Hutten-Czapska*, *Burdov (no.2)*, *Torreggiani*, *Suljagic* and quasi-pilot *Orchowski*

were marked as successes. *Rutkowski* and the quasi-pilot of *Scordino (no.1) v. Italy* were however found to have failed. These remedies work in theory but not in practice because "for instance the amount of compensation is not reasonable" so that in a lot of these cases the Court still had to interfere individually.[984] This view is however not shared by everyone at the Court. One respondent for instance stated that generally the pilot judgment procedure is successful, except for the *Ivanov* case.[985] Another named the case of *Greens and M.T. v. UK* as unsuccessful.[986] The State's reluctance to execute the judgment in this situation is said to be due to the political sensitivity concerning prisoner's right to vote in the UK. It is a point which is politically unsellable and is certainly gone to the background post-Brexit.[987]

Not surprisingly, at the side of the applicants, the evaluation of the effect of the pilot on the ground is more negative. Interestingly, there is critique on the more or less standard practice of the Court to merely ask the State to set up a domestic remedy. This has resulted in the affected States setting up compensation schemes which have in turn been found appropriate by the Court to start striking cases out or finding cases inadmissible for non-exhaustion of domestic remedies. The underlying systemic problem however – for instance the non-execution of domestic judgments, the excessive length of procedures, the sub-standard conditions in detention, etc… - remain to exist. This means that the underlying problem in practice is not solved.[988] It could however be argued that monitoring the solving of the systemic problem itself is the task of the Committee of Ministers. As the Court thoroughly explains in the Burmych case, it does not have to keep entertaining similar cases when the underlying human rights problem is resolved and there is no live Convention issue anymore, while the Committee of Ministers is expressly tasked by the Convention to monitor the execution process.[989]

It must however be emphasized that even in cases where the Court has closed the pilot procedure, the procedure might not have had the intended result. The situation of the erased in Slovenia is for instance still not solved, contrary to the assumption that this might be the case as the Court already closed the pilot proceedings following *Kurić*.[990] The Court closed the case with respect to the segment of the erased who had been able to ask for regularization of their status following the *Kurić* pilot. However, there is still a group who was not able to ask for regularization under the newly set up law in Slovenia. It is estimated that eleven thousand out of twenty thousand erased retrieved their status. The application with respect to this group of persons who is still erased is pending before the Court.[991]

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[984] Interview I dd 17.01.2017.
[985] Interview I dd 16.01.2017.
[986] Interview II dd 16.01.2017.
[987] Interview anonymous II.
[988] Interview dd 1.03.2017; Interview I dd 21.03.2017.
[989] Articles 37.1(b), 19 and 46 of the Convention; ECtHR, *Burmych and others v. Ukraine*, application nos. 46852/13 et al., 12 October 2017, §§ 176-208.
[990] This case involved the situation of the erased, meaning the persons who were erased from the residence logs in Slovenia following the declaration of the country's independence in 1991. There are still persons from this group who remain without a legal status.
[991] Hudoc indicates that this case has not yet been communicated to the state. In order to ensure this respondent's anonymity, there will be no reference to the specific Interview.

VI. Conclusion

Based on the claims in the literature that the pilot judgment procedure is necessary in the light of procedural justice but at the same time hinders applicants' right to individual application, combined with the framework offered by the IAP project, this doctoral thesis centred around the following main research question: How is the pilot judgment procedure working in reality in terms of procedural efficiency and access to justice and do we need changes in this system?

To this end, the research was split up in four distinct sub-questions which will all be addressed in this conclusion:

1) How does the pilot judgment procedure work in practice?
2) Is the pilot judgment procedure efficient?
3) Is the pilot judgment procedure accessible for the applicants involved?
4) How can we make the pilot judgment procedure both efficient, while also accessible to the involved applicants?

These research questions were addressed through a mixed methodology, combining desk research including the study of statistics with qualitative empirical research methods in the form of interviews. Both these methods were necessary when looking at the pilot judgment procedure with an insider view, in order to uncover how it works in reality for the lawyers in Strasbourg and the applicants involved.

The research conducted leads to three distinct sub-conclusions. Firstly, the pilot judgment procedure seems to have outgrown the experimental phase and has now crystalized in a complex procedure. This complexity will be laid down in the first part of this conclusion. Secondly, the pilot procedure is found to be efficient in general, under certain conditions. These conditions will be explained in the second part. Thirdly and lastly, the pilot procedure as it exists today is indeed not satisfactory from an access to justice perspective. Consequently, this third part will highlight the elements of the procedure which pose a problem and touch upon possible adaptions in the procedure which could be further investigated in finding a solution.

A. The pilot judgment procedure: grown out of its infancy

The pilot judgment procedure was created through practice and was thus first not codified. Consequently, there was a lot of uncertainty surrounding it. The interviews at the Court have shown that there still are diverging viewpoints concerning how the procedure works and what its intended goals are. This is because the pilot judgment procedure was designed and remained to be a flexible procedure which can be adapted to the circumstances at hand. The Court has issued pilots in case where there were not many other similar cases pending. It has also decided not to adjourn these similar cases. Sometimes, it has indicated very specific general measures in the operative part of the judgment, other times it has left this task to the Committee of Ministers. The practice varies greatly. The interviews show that this was due to an experimentation phase within the Court.

Lately however, the procedure grew out of its infancy and seems to have entered a new phase. The Registry now puts out a factsheet on pilot judgments which is regularly updated. It contains the following elements of a pilot case: the existence of an underlying systemic issue which leads to multiple similar cases being brought to the Court; the choice of the Court to deal with one or

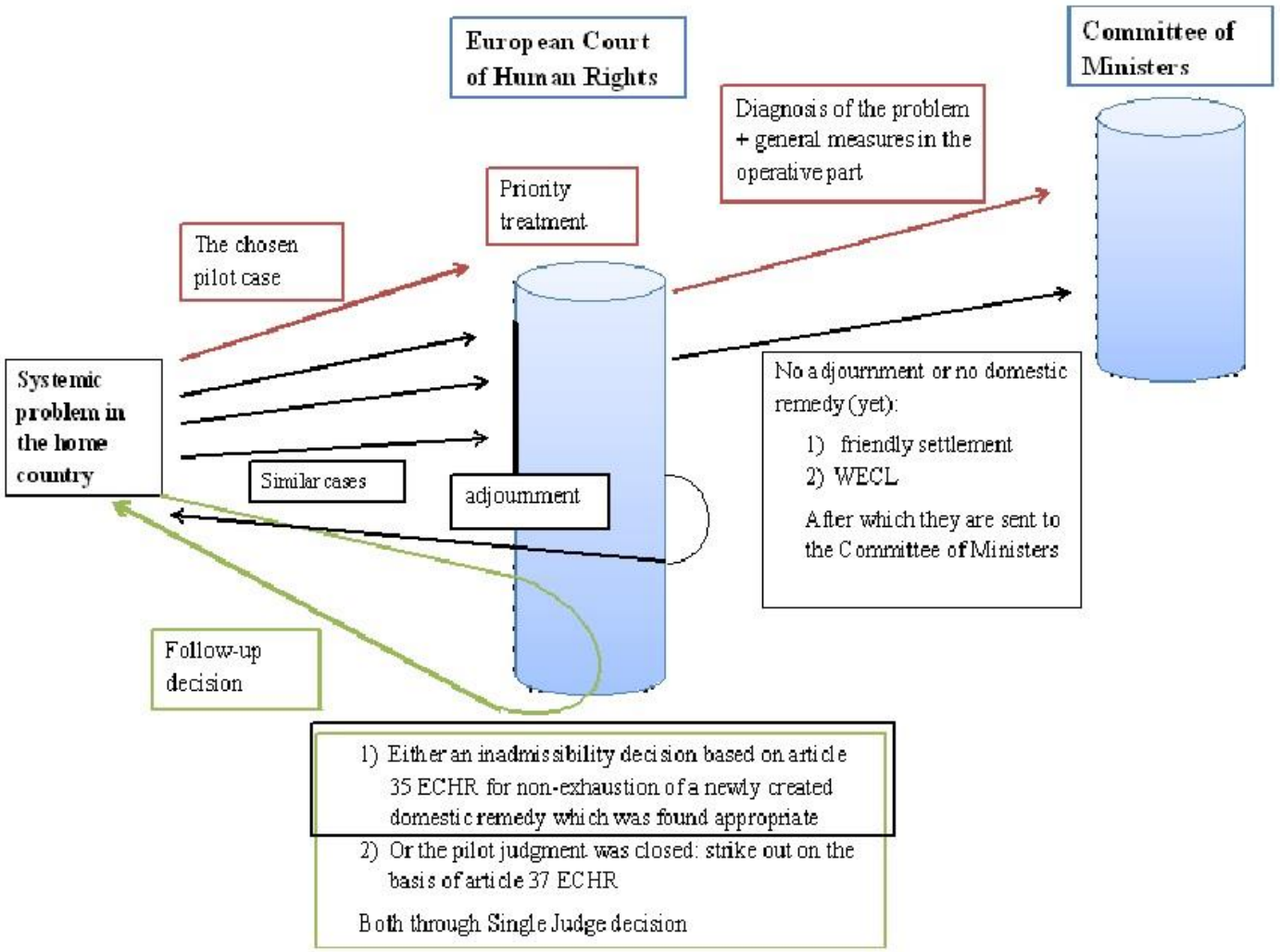
a selection of these cases under priority treatment; the diagnosis of the problem at hand; and the indications given to the involved government of the type of remedial measures necessary to resolve the issue. The fact sheet further includes the possibility to adjourn on the condition that the State acts promptly to execute the requested general measures as the key feature of the procedure. This Registry document also includes a discussion on the follow-up decisions whereby the Court evaluates the general measures set up in certain cases after the pilot case, indicating that this has become standard practice. This follow-up procedure was something that was not explicitly included in the original design of the pilot judgment procedure, but which has now indeed become an integral part of it.

Underneath, the procedure is represented schematically. This is meant to show the pilot judgment procedure in all its complexity and offer a visual guide on the integral functioning of the procedure in practice. It sketches the life of cases that are involved in these pilot judgment procedures. The red lines represent the course of the case chosen as the example or pilot case. These cases are given priority treatment. The Court will further use these to diagnose the underlying systemic issue and to indicate general measures. In most cases, the Court will do so in the obiter dicta of the judgment, leaving it to the Committee of Ministers to oversee the specifics of these general measures. The Court will however mostly include the express obligation to create a domestic remedy both for the victims still at home as for the other pending cases already at the Court.

These other pending cases are represented in black. A large part of these cases will be adjourned pending the creation of a domestic remedy. If this domestic remedy is made retroactively available to the cases already pending at the Court, they can be sent back to the domestic system for non-exhaustion of domestic remedies. If not, they can be dealt with through friendly settlements or a judgment might follow through the Well-Established Case Law procedure (WECL). They subsequently are also sent to the Committee of Ministers which monitors execution. When such a case is ended with a unilateral declaration, it will not be sent to the Committee of Ministers. There will be no monitoring. When the State however does not execute the terms of the unilateral declaration, the applicants can still submit this complaint to the Court again.[992]

The green lines represent the follow-up cases whereby the Court tests the domestic remedy set up in execution of the pilot case. If this domestic remedy is found appropriate, these cases will be found inadmissible for non-exhaustion of domestic remedies and will thus be sent back to the national legal system. If the Court has done so and it continuously receives similar applications, it can decide to close the pilot judgment procedure. This will lead to other cases being automatically struck from the list: the Court has fulfilled its role under the Convention and there is no live Convention issue anymore.

[992] This is ultimately what happened for some applicants in the Yuriy Nikolayevich Ivanov pilot judgment.


European Court of Human Rights
Committee of Ministers
Diagnosis of the problem + general measures in the operative part
Priority treatment
The chosen pilot case
Systemic problem in the home country
Similar cases
adjournment
No adjournment or no domestic remedy (yet):
1) friendly settlement
2) WECL
After which they are sent to the Committee of Ministers
Follow-up decision
1) Either an inadmissibility decision based on article 35 ECHR for non-exhaustion of a newly created domestic remedy which was found appropriate
2) Or the pilot judgment was closed: strike out on the basis of article 37 ECHR
Both through Single Judge decision

B. The pilot procedure is efficient under certain conditions

As elaborated on in this thesis, the pilot judgment procedure was created for several purposes. Efficiency was one of its main goals, as it would enable the Court to process a large group of similar cases in one judgment. When looking at the bigger picture however, it is clear that the pilot judgment procedure only had its role to play in a specific category of cases: the repetitive meritorious applications. At the height of the Court's caseload in 2011, the unmeritorious cases were the overwhelming share of the backlog. When the caseload of the Court thus took a dramatic decline starting 2011, this was not due to the pilot procedure. This was predominantly attributable to the Single Judge procedure which did away with an enormous backlog in unmeritorious – and thus inadmissible – cases.

With respect to these repetitive meritorious cases however, the interviews and the numbers show that the pilot judgment procedure has done its part. This is however when the pilot judgment procedure is looked at in a holistic manner, showing its complete complexity. It is thus the whole chain of decisions, starting with the judgment in the chosen pilot case, over the adjournment to the friendly settlements, the WECL procedure and the follow-up decisions which play a part in the pilot judgment's efficiency. This way, the procedure is certainly capable of being efficient when certain conditions are met.

1. Necessary condition: State cooperation

First and foremost, the State must cooperate. There is no point in starting the pilot judgment procedure when the State is not willing or capable to execute the general measures as requested in the pilot judgment. As witnessed in the *Ivanov* pilot case, it is not possible to send cases back or to conclude friendly settlements or unilateral declarations in cases where the State does not set up a domestic remedy or does not execute the terms agreed to. As a consequence, the Court will be continuously confronted with the same issue over and over leading to the failure of the pilot procedure all together. This in turn negatively affects the caseload, the productivity and the length of proceedings.

2. No complex general measures

The pilot judgment procedure is furthermore efficient when the Court does not require complex general measures from the State. This might explain why the Court in a considerable amount of cases indicates which general measures the State must take in the obiter dicta of the judgment – meaning that these requirements remain non-binding-, while merely including the obligation for the State to set up a domestic remedy in the operative part of the judgment – which is then binding. Setting up a domestic remedy is a simple procedural measure which can rapidly be set up in the national system, compared to requiring States to review their detention policy or to draft new complex legislation. The Court can then use this newly created domestic remedy as a means to find similar cases inadmissible for non-exhaustion of domestic remedies and thus send them back domestically. General measures aimed at eliminating the underlying problem – so-called preventive measures – are then left to the States under the supervision of the Committee of Ministers. Sometimes the Court also includes the obligation for the States to submit an action plan with the Committee of Ministers within a certain time-limit.

VI.1 COURT'S INDICATION OF SPECIFIC GENERAL MEASURES IN OBITER DICTA VS. GENERAL MEASURES IN THE OPERATIVE PART OF THE JUDGMENT

Name of the case	general measures broader than setting up a domestic remedy in obiter dicta	creation of domestic remedy in operative part	general measures other than domestic remedy in operative part	time-limit for action plan with CoM
Broniowski v. Poland	x	x	x	/
Hutten-Czapska v. Poland	x	/	x	/
Burdov (no. 2) v. Russia	/	x	/	/
Olaru and others v. Moldova	/	x	/	/
Yuriy Nikolaeyevich Ivanov v. Ukraine	x	x	/	/
Suljagic v. Bosnia and Herzegovina	x	/	x	/
Rumpf v. Germany	x	x	/	/
Maria Atanasiu and others v. Romania	x	/	x	/
Greens and M.T. v. UK	x	/	x	/
Vasilios Athanasiou and others v. Greece	x	x	/	/
Finger v. Bulgaria	x	x	/	/
Dimitrov and Hamanov v. Bulgaria	x	x	/	/
Ananyev and others v. Russia	x	x	/	x
Ümmühan Kaplan v. Turkey	x	x	/	/
Michelioudakis v. Greece	x	x	/	/
Kuric and others v. Slovenia	/	x	/	/
Manushaqe Puto and others v. Albania	x	/	x	/
Glykantzi v. Greece	x	x	/	/
Torregiani and others v. Italy	x	x	/	/
M.C. and others v. Italy	x	/	x	x
Gerasimov and others v. Russia	x	x	/	/
Alisic and others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia	x	/	x	/
Neshkov and others v. Bulgaria	x	x	/	/
Varga and others v. Hungary	x	x	x	X
Rutkowski and others v. Poland	x	/	x	/
Gaszo v. Hungary	x	x	/	/
W.D. v. Belgium	x	/	x	/
Rezmiveş and others v Romania	x	/	x	x

This construction might be argued to come close to what was originally intended in the Committee of Minister's Resolution on cases revealing underlying systemic problems. The Court is coming back to its original role under this resolution by diagnosing the underlying problem and giving the Committee some guidance as to how the judgment should be executed. The Committee can then again fulfil its traditional role in designing the needed measures together with the State and monitoring their implementation. The Court has thus found its way back to the original design of the pilot judgment procedure and has in the process bettered it.

3. Precluding the perverse effect of attracting more similar cases

Lastly, the Court must particularly pay attention to cases where it is being made part of the national enforcement system, such as in the case of *Yuriy Nikolayevich Ivanov v.Ukraine*. In cases where there is indeed a rule of law issue, such as mass non-enforcement of domestic decisions, the Court might be seen as the last hope for the affected victims. Issuing a pilot judgment in such a case has the perverse effect of attracting thousands of similar cases. The fact that the Court is awarding sums of just satisfaction is the main element here, turning the Court de facto in a reparations tribunal. This is certainly not the role of the Court under the Convention and it has a disastrous consequence for the Court's efficiency. The Court thus decided in the *Burmych* case that it was not going to be turned into such a reparations tribunal and decided to strike all of these cases out of its list and hand them over to the Committee of Ministers to be dealt with under the execution process of the *Ivanov* pilot. This contrary to the right to individual petition of these victims, as the procedure before the Committee merely foresees for them the possibility to submit their views concerning the execution of individual measures. Seeing these developments, it is necessary to investigate whether there is a possibility for the Court to judge on the underlying issue while also being protected from streams of applicants merely turning to Strasbourg to request just satisfaction.

a. Whether the Court can refrain from awarding just satisfaction

The question whether the Court could refrain from awarding just satisfaction in pilot cases is certainly an interesting and important one. Article 41 of the Convention does not make awarding just satisfaction a mere possibility for the Court. It states that "[i]f the Court finds that there has been a violation of the Convention and the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court *shall,* if necessary, afford just satisfaction to the injured party."[993] It is however not said how much and in which manner the Court must do so.

The Ukrainian State in the *Ivanov* case already raised the issue that it did not have the required budget to compensate all of these victims, adding also the uncertainty that there could be more. The underlying claim revolved around monetary issues. Ukraine had been brought before the Court for non-execution of domestic judgments which created for the involved applicants a right to compensation from the government. When the Court thus ordered the State to not only execute these domestic judgments but also to pay just satisfaction to the applicants involved, the Court in reality aggravated the problem. Furthermore, as Lambert Abdelgawad has shown, execution depends more on political willingness than on the fear of being sanctioned.[994] As a result, it is thus more effective to build political willingness in the home State.

[993] Article 41 ECHR; emphasis added.
[994] E. LAMBERT ABDELGAWAD, *The execution of judgments of the European Court of Human Rights*, Council of Europe Publishing, 2008, 291.

A solution might arguably be found in setting up a separate structure where the State makes a certain fixed sum available and victims can submit their claims for just satisfaction.[995] This enables the State to anticipate the required budget. This in turn might foster a more cooperative State, a criterion which is primordial in turning a pilot successful. Secondly, it alleviates the workload for the Court. This trust can operate independently from the Court, it can be made part of the Committee of Ministers as it belongs in the execution process following a pilot case. Thirdly, it enables all victims to put in their claim and in the process argue why their case must be differentiated from the original pilot. As will be explained below from page 207 onward, this would be a step forwards in the light of the procedural justice standards of correctability and representation.

b. Protocol no. 16.

A solution could further be found in the entering into force of Protocol no. 16, which will enable the Court to bring out advisory opinions. The Protocol at the time of writing – January 2018 – has eight ratifications.[996] Ten ratifications are necessary for it to enter into force.[997] The Court can already bring out advisory opinions upon request of the Committee of Ministers on legal questions concerning the interpretation of the Convention.[998] Protocol no. 16 however foresees the possibility for the highest courts and tribunals of the States parties to request the Court for advisory opinions on question of principle concerning the interpretation of the Convention in the context of a case pending before it.[999] It is not the aim of this procedure to transfer the case to the Court. It stays at the national level while it allows the Court to focus on the question of principle in assistance to the national court tasked with resolving the case.[1000] There must be a case underpinning this request for interpretation, there can thus not be an abstract review of a State's legislation.[1001] The involved State has the right to take part in the proceedings. The President of the Court can also invite any person or other State to take part.[1002] The explanatory report clarifies that the parties to the case at the national level would be invited to submit their

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[995] Clear examples of this are the Mesothelioma and Asbestos Trust Funds in the United States (see https://www.asbestos.com/legislation/trust-fund.php). See further United States Government Accountability Office, Report to the Chairman, Committee on the Judiciary, House of Representatives, *Asbestos Injury Compensation – The Role and Administration of Asbestos Trusts*, GAO-11-819, September 2011. There are similar trust funds in South Africa (see http://asbestostrust.co.za/home/) and in the United Kingdom (see https://tandnasbestos.org.uk/). Belgium also has a fund for asbestos but this was not set up following litigation (see http://www.fedris.be/afa/afa_nl.html).

[996] Council of Europe¸ *Chart of signatures and ratifications of Treaty 214*, available https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/214/signatures?p_auth=mXr8XsDw.

[997] Parliamentary Assembly of the Council of Europe, *Draft Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, Opinion 285 (2013), 28 June 2013.

[998] Article 47-48 ECHR.

[999] Article 1 Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe Treaty Series – No. 214, 2 October 2013.

[1000] Council of Europe, *Explanatory Report to Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms,*Council of Europe Treaty Series – No. 214, § 11; ECtHR, *Opinion of the Court on Draft Protocol no; 16 to the Convention extending its competence to give advisory opinions on the interpretation of the Convention*, 6 May 2013, § 8.

[1001] ECtHR, *Opinion of the Court on Draft Protocol no; 16 to the Convention extending its competence to give advisory opinions on the interpretation of the Convention*, 6 May 2013, § 7.

[1002] Article 3 Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe Treaty Series – No. 214, 2 October 2013.

views. These proceedings at the Court would thus also be open to the applicants and potentially to third party interventions.[1003]

It is important to remark that these opinions are not binding on the high court requesting them, nor do these courts have to motivate why they depart from the Court's opinion.[1004] The parties to the underlying case however can still turn to the Court afterwards. When the national court requesting the advisory opinion has followed it, the parties cannot bring claims based on this back to the Court. However, when the national court had not followed the opinion, they can bring their claim to the Court. Interestingly, these advisory opinions will become part of the case law of the Court although they will not have direct effect on other later applications.[1005] This kind of construction would thus allow the Court to focus on the issue of principle affecting large groups of victims in the home State. If the national courts than follow the Court's opinion, the problem might be solved before it floods the Court's gates.

There is however an important consideration to be made here. As explained earlier, the jurisprudence of these highest courts have previously been taken into account by the Court in the context of pilot procedures. This thus means that these courts had already found that there was a systemic problem in the home country before the cases eventually came to Strasbourg. Consequently, even when the country's highest court find that there is a structural issue which must be addressed, the State authorities might still not address it. The question thus raises whether the involved State would be more inclined to remedy the structural problem when the national highest courts' judgments are already based on the opinion of the European Court of Human Rights.

[1003] Council of Europe, *Explanatory Report to Protocol No; 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms,*Council of Europe Treaty Series – No. 214, § 20.
[1004] Article 5 Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe Treaty Series – No. 214, 2 October 2013; ECtHR, *Opinion of the Court on Draft Protocol no; 16 to the Convention extending its competence to give advisory opinions on the interpretation of the Convention*, 6 May 2013, § 12.
[1005] Council of Europe, *Explanatory Report to Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms,*Council of Europe Treaty Series – No. 214, § 26-27.

C. The pilot procedure lacks accessibility: some proposals

With the pilot judgment procedure the Court claims to have returned to its original role under the Convention of setting the principles to which the States must abide in executing their duties under the European Convention on Human Rights. This was named in the interviews to be the other primordial aspect of the procedure, next to procedural efficiency. It enabled the Court to put the emphasis back on the States and require them to take up their roles under the Convention's subsidiarity principle to execute the Court's judgments and provide effective domestic remedies for victims of large-scale human rights violations. Certainly with the new developments in the *Burmych* case, the Court has refused to let itself be a part of the national legal systems by having to render judgments awarding just satisfaction due to malfunctions in domestic courts, and rightly so.

The Court was however created for the benefit of the roughly 800 million persons under the jurisdiction of the Council of Europe. The Court can consequently not deny its duty towards the applicants. The interviews have made clear that the Court's communication – including its judgments – is very formal and theoretical. Some respondents argued that its work is intended for lawyers and academics, rather than for the victims involved. The Court indeed is tasked with interpreting the Convention, thereby developing common European human rights standards.[1006] However, it must not forget its original duty towards the victims of human rights violations as exemplified by the right to individual justice and its central status in the European Human Rights System. Otherwise, the Court risks to provide justice which is merely illusory and theoretical, rather than practical and effective.[1007] With reference to this difficult marriage between individual and constitutional justice, one respondent at the side of the applicants stated that the pilot judgment procedure "*is a compromise and as all compromises it has some drawbacks, it's probably the best that the Court can do right now*."[1008] An interviewee at the Court went further and stated that there is no justice in a pilot judgment for the individuals involved.[1009]

This thesis takes a more nuanced viewpoint. It is posed that it is possible for the Court to combine these two emphases of procedural justice and access in the pilot judgment procedure, provided that some adaptations are made. The tension which was discussed at the beginning between the need for the Court to focus on procedural efficiency and the interests of the applicants involved can thus be relaxed under certain conditions. Finding ways to fulfil both sets of interests further fits well with the goal set in Work Package 5 of the IAP project: "The research will formulate clear-cut and substantiated proposals reconciling optimal access with

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[1006] This has been termed in the literature as the constitutional role of the Court, which is put in contrast with its task to deliver individual justice as explained under "The decision to apply the pilot procedure" starting from page 36 .

[1007] Ensuring rights which are practical and effective is a recurring requirement the Court ask of both itself as well as the states in its own case law. See in this regard the case of Airey v. Ireland where the Court established this principle; see ECtHR, *Airey v. Ireland*, application no; 6289/73, 9 October 1979, §24; More recent examples can be found in the cases of ECtHR, *Lupeni Greek Catholic Parish and others v. Romania*, application no; 76943/11, 29 November 2016, § 86; and ECtHR, *Khamtokhu and Aksenchik v. Russia*, application nos. nos. 60367/08 and 961/11, 24 January 2017, § 30.

[1008] Interview I dd 21.03.2017.

[1009] Interview anonymous I.

the need of procedural efficiency and an efficient management of incoming cases."[1010] The points which raise problems in the context of access to justice will be discussed following the same structure as above.

1. Improving access to clear legal information

There does not seem to be a standard practice concerning the provision of information to both the applicants in the pilot case, as well as the applicants in the other similar cases. The information which is provided further is clearly intended for the lawyers of the applicants, as it is drafted in a theoretical and formal manner. The Court could invest more in making its communication understandable to laymen.

With respect to the applicants in the pilot case, the Court should first work out such a standard practice whereby it also includes information concerning the procedure itself and what the applicants can expect.

With respect to the applicants in the other cases, many respondents were not even aware of any information to this group of applicants. As a result, there should be some form of communication targeted to this group. A press release in the language of the involved country can suffice, certainly if the respondent State is required to spread it in the home country.

2. Friendly settlements and unilateral declarations: only when the State cooperates

Respondents at both sides of the procedure indicated that friendly settlements and unilateral declarations are only useful when the State cooperates. Although principled, this is mere logic. The system concerning friendly settlements and unilateral declarations is in essence a fast-track procedure which is meant to be a win-win-win situation. If friendly settlements and unilateral declarations are allowed in cases where the cooperation of the State is unclear, this would only result in a win-situation for the State. The involved applicants would not receive just satisfaction, nor would the underlying issue be resolved. This in turn would maintain – or even aggravate – the constant stream of similarly situated applicants to the detriment of the Court. Looking holistically at the pilot procedure then, it can be deduced that these friendly settlements and unilateral declaration should only be allowed after the Court has already taken a follow-up decision in which it has verified that the State has executed the pilot judgment, at least with respect to setting up a domestic remedy and ideally with addressing the underlying issue as a whole.

3. Fair procedures and due process

a. Voice: drawing inspiration from class actions in the interests of the silent majority

Voice presents one of the biggest challenges here. The applicants in the pilot case are heard before the Court. The applicants in the other cases however do not get their voices across. There is however an important role here for the lawyers and human rights NGO's involved. Rule 61 foresees the possibility for the applicants to request the application of the pilot judgment

[1010] See page 10 above.

procedure. Based on the interviews, it seems that none of the pilots that have already come out have been initiated by the applicants. This provision however creates the possibility for the applicants to group themselves – either with or without the involvement of an NGO – and go to the Court. Such grouping would in turn be beneficial to the Court for it could process and register the incoming petitions efficiently.[1011] This however assumes that there is a definable class of individuals – such as in *Broniowski* for example[1012]- who can group themselves to bring the attention of the Court to the underlying issue, which is not always the case.[1013]

In this sense, it is interesting to draw inspiration from class action procedures. First of all, it must be emphasized that there is not one class action procedure, these types of procedures are part of a spectrum as well. There is the archetype of the class action in the US Federal Rules.[1014] There are also several variations and procedure derived from the class action across the globe: from Canada, to Brazil, over Finland to Belgium, from South Africa to South Korea.[1015] There are however some general traits to the procedure. A class action can be defined as a representative action brought by a legally appointed litigant on behalf of a group of similarly situated, unknown litigants that have not given power of attorney to this representative beforehand.[1016] The judgment resulting from this representative action is then binding on all members of the class.[1017] Class actions differ from pilot judgment as they do not rely on one test case, which is individual in nature, for rendering a decision on the larger underlying issue. Class actions result in a court deciding on the legal or factual issues common to the whole class.

Class actions however are relevant here because show that in principle, it is possible to render a judgment on a large-scale issue without hearing every individual involved. The condition however is that there are a number of safeguards built into this procedure which are aimed at protecting the silent majority of victims. The reference to class actions is not new. It has been first hinted towards in the *Broniowski* case with the Court's phrasing of 'an identifiable class of citizens'.[1018] It was first explicitly brought up as a reference point for the pilot judgment procedure by Judge Zupančič in his separate opinion to *Hutten-Czapska v. Poland*. In his separate opinion, Judge Zupančič even explicitly references to the certification stage of class

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[1011] See in this sense Erik Fribergh, former Registrar at the European Court of Human Rights who called on the relevant Hungarian trade unions to group cases in order for the Court to be able to manage them. The Registrar stated that "it is important that the presentation of the applications be coordinated at national level by a limited number of representatives." See European Court of Human Rights Press Release, *European Court Registrar calls for special measures to deal with influx of Hungarian pension cases*, ECHR 009 (2011), 11 January 2012.

[1012] ECtHR, *Broniowski v. Poland*, application no. 31443/96, 22 June 2004, § 189.

[1013] See the Continuum of pilot and pilot-like cases on page 29.

[1014] Rule 23 Federal Rules of Civil Procedure (US), 20 December 1937, http://uscode.house.gov.

[1015] For an overview, see the website of 'Global Class Actions Exchange', an joint initiative of Stanford Law School, the Oxford Centre for Socio-Legal Studies and Tilburg University: http://globalclassactions.stanford.edu/.

[1016] Class actions in this context are defined as a representative action brought by a legally appointed litigant on behalf of a group of similarly situated, unknown litigants that have not given power of attorney to this representative beforehand; see P.G. KARLSGODT, *World Class Actions: A Guide to Group and Representative Actions around the Globe*, OUP, 2012, xxxix.

[1017] S.VOET, *Een Belgische vertegenwoordigende collectieve rechtsvordering*, Intersentia, 2012, 13.

[1018] ECtHR, *Broniowski v. Poland*, application no. 31443/96, 22 June 2004, § 189.

actions, which will be discussed here.[1019] There are also traces to be found of the comparison drawn between class actions and pilot judgments in the literature.[1020] It must however be emphasized that this thesis does not aim to make a comparison with class actions, it wants to learn from the class action's procedural design with respect to the protection of absent class members.

Voet has identified the main building blocks in the class action procedure, from which this dissertation will draw inspiration. Specifically, the criteria developed in the context of certification are of importance here. Certification takes place during the admissibility phase.[1021] It is intended to make sure that the class action is the most efficient manner to handle the cases and that the class representative is appropriate to represent the class. Therefore it is firstly important that there is a common legal or factual dispute at the base of the class action. This is the requirement of commonality. Secondly, treating the issue in the form of a class action must the superior option in terms of efficiency than treating all of these cases separately, which has been termed the requirement of superiority. Thirdly, the chosen representative must be appropriate to represent the whole class.

The first two of these requirements are already built into the pilot judgment procedure. Firstly, the efficiency reasoning underpinning the pilot judgment procedure shows that pilot cases would in principle meet the requirement of superiority. Rule 61 further States that the Court may initiate the pilot judgment procedure when the underlying issue triggers or may give rise to similar applications. The interviews lastly show that the pilot procedure is a tough procedure for the Registry, ensuring that the Court will not resort to this procedure if not absolutely necessary. Secondly, the requirement of commonality is in principle also covered as based on Rule 61, the pilot procedure must be concerned with cases originating from the same source: a structural or systemic problem in the home country. The third requirement will however be of great importance here. It will be discussed more in detail below from page 208.

b. Consistency and accuracy: specialized division within the Court's Registry

There are no fixed criteria for gathering information and for making the decision to apply the pilot judgment procedure. This may lead to a differing practice, resulting in uncertainty for all involved as witnessed by past practice in the experimentation phase. Furthermore, the States parties had already called on the Court to develop clear and predictable standards for the procedure in the Interlaken Declaration. They urged the Court to do so specifically with respect to the selection of applications, the procedure to be followed in the adjourned cases and to evaluate the effect of applying the procedure.[1022] Susi further has argued that greater

[1019] ECtHR, *Hutten-Czapska v. Poland*, application no. 35014/97, 19 June 2006, Parly concurring, partly dissenting opinion of Judge Zupančič.
[1020] L.R. HELFER, "Redesiging the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime", *The European Journal of International Law*, 2008, Vol. 1, 148; T. SAINATI, "Human Rights Class Actions: Rethinkingg the Pilot-Judgment Procedure at the European Court of Human Rights", 56 *Harvard International Law Journal* No.1, 2015.
[1021] S.VOET, *Een Belgische vertegenwoordigende collectieve rechtsvordering*, Intersentia, 2012, 367- 368.

[1022] High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration, 19 February 2010, 7 b).

predictability concerning the concept and consequences of the pilot judgment procedure, might alarm the States into addressing their underlying issues. As long as the procedure lacks predictability, he claims that this is not the case.[1023] Increased consistency and accuracy thus not only is important for the applicant in order to predict what will happen with their case. It is further an element which might cause greater impact with the involved States.

As the procedure has now assumed a clear shape, there could be created a specialized division within the Court concerning the pilot procedure.[1024] The Court already has a program for creating greater specialization within the Registry. Across different divisions,[1025] the Court is bringing experienced Registry lawyers from varying countries together in specialization hubs with a view to obtain greater operational efficiency and developing staff expertise. These specialization hubs will then have an advisory role in each area of expertise. The Court does this with the aim of having a more standardized and consistent drafting by the Registry of cases. There is already a first hub, created mid-2016 which specializes in asylum and migration issues.[1026] Pilot judgments could however be another one, by which more consistency and accuracy could be ensured in this field.

c. Correctability: creating the possibility to argue differentiation

The applicants in the similar cases do not receive the possibility to argue their case, nor to submit that their case differs from the chosen pilot. This not only presents a problem for these applicants, it also reduces the possibility of having a holistic view of the problem and thus of the measures required to address the underlying systemic issue.[1027] When the wrong measures are taken, the case can come back to Strasbourg leading again to an influx of repetitive cases. This is thus not only an issue from an access to justice viewpoint but might also pose problems from the perspective of procedural efficiency. There must thus be a procedure for these applicants to submit to the Court that their case is different.

It is true that a variation of this has taken place in the follow-up decision of *Zaluska and Rogalska*.[1028] Part of the applicants here argued that the circumstances in their case differed, leading to their request for a higher award of just satisfaction. Applicants should however be given the opportunity to argue that their case differs from the chosen pilot away from the question concerning pecuniary damage, enabling the Court to see the complete picture of the underlying systemic problem. There could be merit in creating a possibility with such a specialized pilot judgment 'hub'. Such a pilot division could respond to claims from applicants for differentiation more rapidly based on experience and specialized knowledge. Practically,

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[1023] M. SUSI, "The Definition of a 'Structural Problem' in the Case law of the European Court of Human Rights Since 2010", *German Yearbook of International Law*, 2012, 404.
[1024] This idea was brought up during an Interview with a lawyer on the sides of the applicants; Interview I dd 21.03.2017. A respondent at the Court also mentioned the class action procedure as a source of inspiration; Interview I dd 16.01.2017.
[1025] Every member state of the Council of Europe has its own division within the Registry.
[1026] European Court of Human Rights, *The Interlaken Process and the Court (2016 Report)*, 1 September 2016, § 12.
[1027] E. LAMBERT ABDELGAWAD, *The execution of judgments of the European Court of Human Rights*, Council of Europe Publishing, 2008, 49; referring to CDDH (2007) 011 Addendum 1, Interim Report, 13 April 2007.
[1028] ECtHR decision, *Zaluska and Rogalska v. Poland*, application nos. 53491/10 and 72286/10, 20 June 2017.

the press release following a pilot case could include the possibility for similarly situated applicants to differentiate their case. As mentioned on page 147, an online tool already exists for applicants to follow their case at the Court. Such an online tool could be expanded in pilot cases to providing a standard form within which applicants can shortly argue differentiation. This gives them the opportunity to do so, while makes it manageable for the Court to process.

d. Representation: certification of the procedure

With reference to the certification of the procedure as mentioned above in "Voice: drawing inspiration from class actions in the interests of the silent majority", representation is reflected in requiring appropriate representation of the common underlying issue and thus of the whole of the affected victim pool. This results in the requirement that both the party as well as his or her lawyer must be capable and appropriate to represent the class.[1029] Requiring appropriateness ensures that the applicant in the representative case is willing to represent the whole class. His or her lawyer must further show a minimum level of competence in handling such large-scale cases and in the subject of the case at hand.[1030] The interviews at the Court have indeed shown that the quality of the work delivered by the lawyer in the case is important to make a pilot successful, although it is not a criterion based upon which the Court selects a case as the pilot. The principle of adequate representation is thus not yet explicitly part of the pilot judgment procedure. As the pilot procedure is meant to foster change and thus to affect all victims involved, this should be a minimum requirement in deciding which case to choose as the pilot case.

The interviews have further shown that the Court selects the pilot based on a number of criteria including whether the case exemplifies the problem well. In a lot of cases, the Court selects a group of applications who together cover the whole of the underlying problem. The Court thus already aims to ensure that the underlying legal issue is uncovered in its entirety in order to foster a good representation of the involved applications. However, there is no possibility for the other applicants to claim that their case is different than the pilot(s) selected.

This possibility does exist in a class action procedure. In case of an opt-in class action, all persons who want to be included in the class need to specifically express their wish to the Court. Although they do not become parties to the case per se and are thus not heard by the Court, their opt-in to the procedure exemplifies their express consent to be included. The pilot judgment procedure however leans closest to an opt-out class action procedure, where all persons falling within the defined class are automatically part of the class action. If they do not wish to be included and thus might wish to bring their case individually because they do not regard themselves to be part of the class, they can opt out of the class by specifically expressing their wish to the Court.[1031] Including a possibility for the similarly situated applicants to submit arguments why their case differs from the chosen pilot would thus improve the pilot judgment

[1029] S.VOET, *Een Belgische vertegenwoordigende collectieve rechtsvordering*, Intersentia, 2012, 369.
[1030] P.G. KARLSGODT, *World Class Actions: A Guide to Group and Representative Actions around the Globe*, OUP, 2012, 23.
[1031] P.G. KARLSGODT, *World Class Actions: A Guide to Group and Representative Actions around the Globe*, OUP, 2012, xxxix – xl.

procedure from an access to justice perspective on the basis of representativity, correctability and voice.

D. Need for further research

The proposals made in this dissertation's conclusion are to be seen as suggestions for further research. The merit of this research is predominantly in uncovering the complete intricacy of the pilot judgment procedure and further evaluating it from two normative frameworks: procedural efficiency on the one hand and access to justice on the other. As a result, this dissertation has identified some elements in the procedure which pose problems in reality.

From the viewpoint of procedural efficiency, there are three conditions that must be kept in mind if the pilot judgment procedure is to be successful: State cooperation, no complex general measures and precluding the attraction of more similar cases. These are however not elements which the Court has control over. Consequently, the Court can merely take them into account when deciding to apply the pilot judgment procedure. This thesis further tried to formulate some proposals through which the Court can try and foster the best possible conditions for working with the pilot judgment procedure. These can be researched more thoroughly in order to create an action plan to be used in practice.

As to access to justice, this research has uncovered elements of the pilot judgment procedure which are de facto hindering the involved applicants' right to individual application. Contrary to the situation in the context of procedural efficiency, these are steps in the procedure which the Court can control. As a result, this research has formulated proposals for the Court to alter its procedure in order to meet the applicants' needs in this respect. The Court was not only created to set a theoretical standard for human rights in Europe. It was set up in the aftermath of World War II for the persons under the control of European States who need an institution to turn to when their human rights are violated. The Court cannot forget its function in this regard. There is no point in safeguarding the efficient functioning of a system which is sailing off course.

Annex 1 – List of respondents

AT THE COURT

- President Guido Raimondi
- Judge Linos-Alexandre Sicilianos
- Judge Paulo Pinto de Albuquerque
- Judge Ledi Bianku
- Judge Ayşe Işil Karakaş
- Judge Paul Lemmens
- Judge (now former Judge) Mirjana Lazarova Trajkovska
- Former Judge Egbert Myjer
- Jurisconsult Lawrence Early
- Deputy Section Registrar Renata Degener
- Deputy Section Registrar Hasan Bakirci
- Registry Lawyer Irene Gentile-Brown
- Registry Lawyer Claire Dubois-Hamdi
- Registry Lawyer Ana Vilfan-Vospernik
- Registry Lawyer Natalia Kobylarz
- Registry Lawyer Boglárka Benkó
- Anonymous I
- Anonymous II
- Anonymous III

LAWYERS

- Prof. Dr. Philip Leach
- Prof. Dr. Dmitri Bartenev
- Prof. Dr. Andrea Saccucci
- Dr. Krassimir Kanev
- Dr. Neža Kogovšek Šalamon
- Dr. Dániel Karsai
- Ms. Chloé Bregnard Ecoffey
- Mr. Zouhaier Chihaoui
- Mr. Peter Verpoorten
- Anonymous

Annex 2 – Questionnaire used at the Court

1. General: introduction

Introduction	Introduction of project + confidentiality agreement
Question	Could you tell me about your experience with the PJP (in general)?
Question	How do you define a pilot judgment procedure?

2. How does the PJP work? – EFFICIENCY

Category	***Caseload***
Subcategory	*Numerical*
Question	How do you consider your workload?
Follow-up	Do you see an evolution/a change in the last years?
Follow-up	Since when have you noticed this change?
Follow-up	Why do you think that is?
Follow-up	How – do you think – has the PJP influenced this evolution?
Subcategory	*Simplicity/complexity*
Question	What kinds of cases does the PJP deal with?
Category	***Productivity***
Question	How does the application of the PJP influence the productivity of your section?
Follow-up (when asked to clarify how productivity is defined)	How does the application of the PJP influence the hours worked on a bulk of cases?
Category	***Length of proceedings***
Question	How does the application of the PJP influence the length of a procedure in the pilot case?
Follow-up	Do you have any idea as to how it influences the length of a procedure in a case that was adjourned because of a pilot case?
Subcategory	*Time-frames of proceedings*
Question	Has the Court developed standards for optimum time-frames with respect to pilot cases?
Follow-up	Are these time-frames communicated to the parties?
Subcategory	*Monitoring of the course of proceedings*
Question	How does the Court monitor where and why delays occur?
Subcategory	*Prompt diagnosis and mitigation of delays*
Question	What tools – procedural or others - are used to mitigate delays or reduce the length of proceedings?
Category	***Clearance rate***
Question	In looking at the Court's statistics, I have noticed an evolution in clearance rate. Between 2012 and 2014, the Court disposed of a big amount of the cases on its docket. In your opinion, what made this possible?

3. How does the PJP work? – ACCESS TO JUSTICE

Category	**Access to clear legal information**
Subcategory	*with respect to the pilot case*

Question	What kind of information is provided to the applicants of the pilot case concerning the procedure?
Follow-up	How does the Court inform the applicants as to the functioning of the procedure?
Follow-up	How does the Court inform the applicants as to the consequences of the application of the procedure?
Question	According to the rules, the Court invites the parties' submissions concerning the application of the procedure. What is the weight given to these submissions?
Follow-up	If the Court does not follow the submissions by the applicants, does the Court inform them as to why?
Subcategory	*With respect to the other cases (adjourned cases)*
Question	What kind of information is provided to the applicants of the adjourned cases?
Follow-up	Are they informed as to the functioning of the PJP?
Follow-up	Are they informed as to why their case was adjourned?
Follow-up	Are they informed as to why their case was not selected as the pilot case?
Follow-up	When are they provided with this information?
Follow-up	Are these other applicants given time to give their submissions as to the application of the PJP?
Follow-up	Do they have the opportunity to argue as to why the pilot is/is not representative?
Follow-up	What weight is given to these submissions?
Follow-up	Does the Court then motivate why it followed/did not follow these submissions?
Category	**Alternative dispute resolution mechanisms**
Question	How does the requirement of friendly settlement work in the context of the PJP?
Follow-up	Why is it successful/is it unsuccessful?
Question	Who is involved in these talks?
Follow-up	Are the applicants of the adjourned cases involved?
Question	What is the result of these friendly settlements on the applicants of the adjourned cases?
Category	**Fair procedures and due process/ Procedural justice**
Subcategory	*Voice*
Question	How do the applicants express their views during the procedure?
Question	What kind of influence do they have on the outcome arrived by through the procedure?
Subcategory	*Consistency/Bias suppression/Accuracy/Representation*
Question	How is it decided to apply the PJP?
Follow-up	How is the information collected upon which to decide to apply the PJP?
Question	What influences the decision to apply the PJP?
Question	What criteria are used to apply the PJP?
Follow-up	What criteria are there concerning number of cases involved?

Follow-up	What criteria are there concerning the representativeness of the PJP?
Question	What weight is given to the status of the applicants?
Subcategory	*Correctability*
Question	What options do the applicants of the pilot case have when they do not agree with the outcome of the case?
Question	What options do the applicants of the cases that were adjourned have when they do not agree with the outcome of the pilot case?
Category	**Appropriate case management**
Question	The rules of court specify that the Court can examine an adjourned case 'when the interests of the justice so require'. How is this interpreted in practice?
Follow-up	Why have adjourned cases in the past been re-examined?
Category	**Vulnerability**
Question	What are the consequences of the applicants being marked as vulnerable?
Question	How do you define vulnerable?
Follow-up	What do you think about the use of the concept of 'vulnerability' in the Court's case law?
Category	**NGO involvement**
Question	What is the weight given to third party intervention?
Follow-up	How does the kind of NGO involved influence the weight given?
Question	What are the differences in cases where the lawyers are specialized in human rights law?
Question	What are the differences in cases where the lawyers are part of a human rights organization?

Annex 3 – Questionnaire used during interviews with applicants' lawyers and human rights NGO's

1. General: introduction

Question	Could you tell me about your experience with the PJP (in general)?
Question	Did you represent only the applicants in the pilot case, or also applicants in adjourned cases concerning the same systemic issue?

2. Strategy

Question	Did you know about the procedure beforehand?
Question	If so, did you intend for your case to be a pilot case?
Question	How did you argue that this was a systemic/structural issue ?
Question	How does the use of the pilot judgment procedure fit into your overall strategy?
Question	If this is part of a strategy, where does your main focus lie: with the applicants or with the bigger issue?
Question	Does this strategy also involve the implementation of a possible judgment?
Question	Do you communicate with the other lawyers/organizations involved?
Question	Do you have any influence on the selected pilot?
Question	If so, did you select an example case (or a group of cases)?
Question	If so, how did you select the example case?
Question	How do you regard the freezing of cases in the context of the pilot judgment procedure?

3. Relationship with applicants

Question	How did the applicants in the case find you?
Question	How would you describe your relationship with them? How would you describe the role that you play in these cases?
Question	How do you consult with them in building your case?
Question	How would you estimate the distance between you and the applicants?

4. Communication with applicants

Question	What kind of information do you receive from the Court? Both as to the functioning of the PJP, as well as with respect to the consequences.
Question	How do you communicate with the applicants? Both the applicants of the pilot case, as well as those of the frozen cases.

5. Communication with the Court

Question	How do you evaluate your communication with the Court's Registry?
Follow-up	Who is your main communication with within the Registry?
Question	How do you evaluate the Court's communication with the applicants?

6. Friendly settlements / unilateral declarations

Question	How do you consider the involvement of friendly settlements in pilot judgment procedures?
Question	How do you consider the involvement of unilateral declarations in pilot judgment procedures?

7. Vulnerability

Question Have you used the concept of vulnerability in your application?
Question If so, why did you use it? (strategy?)
Question If you used the concept, was it picked up by the Court?

8. NGO lawyers

Question How would you estimate your work differs from lawyers with/without an NGO connection?
Question How would you describe the advantages and disadvantages?

Annex 4

VI-A CASES OPEN OR CLOSED + LEVEL OF COOPERATION OF THE STATE (JUNE 2004 - JUNE 2017)

Name of the case	date of judgment	domestic remedy deemed effective by Court?	judgment/decision concerning domestic remedy	date of Court's decision concerning domestic remedy	case closed for Court?	name of Court's decision closing	date of Court's decision closing	case closed for CoM?	date of CoM resolution to close	number of CoM Resolution to close	pending - date of last interim CoM resolution	pending - number of latest interim CoM Resolution	time between judgments and CoM final resolution	time the case has been pending (until 30 June 2017)
Broniowski v. Poland	22/06/2004	yes	Wolkenberg v. Poland	4/12/2007	yes	E.G. v. Poland and 175 other Bug River applications	23/09/2008	yes	30/09/2009	CM/ResDH(2009)89	/	/	5 years, 3 months	
Hutten-Czapska v. Poland	19/06/2006	yes	The association of real property owners in Lodz v. Poland	8/03/2011	yes	The association of real property owners in Lodz v. Poland	8/03/2011	yes	21/09/2016	CM/ResDH(2016)259	/	/	10 years, 3 months	
Burdov (no. 2) v. Russia	15/01/2009	yes	Nagovitsyn and Nalgiyev v. Russia + Fakhretdinov and others v. Russia	23/09/2010 (both same date)	no	/	/	yes	2/12/2011	CM/ResDH(2011)293	/	/	2 years, 11 months	
Olaru and others v. Moldova	28/07/2009	yes	Balan v. Moldova	24/01/2012	no	/	/	no	/	/	8/03/2012	CM/Del/Dec(2012)1136/15		7 years, 11 months
Yuriy Nikolaeyevich Ivanov. Ukraine	15/10/2009	no	/	/	unclear (Burmych v. Ukraine - strike-out)	/	/	no	/	/	6/12/2012	CM/ResDH(2012)234		7 years, 9 months
Suljagic v. Bosnia and Herzegovina	3/11/2009	yes	Zadric v. Bosnia and Herzegovina	16/11/2010	no	/	/	yes	8/06/2011	CM/ResDH(2011)44	/	/	1 years, 7 months	
Rumpf v. Germany	2/09/2010	yes	Taron v. Germany	29/05/2012	no	/	/	yes	5/12/2013	CM/ResDH(2013)244	/	/	2 years, 3 months	
Maria Atahanasiou and others v. Romania	12/10/2010	no	/ (but look at Preda v. Romania - there was no caselaw yet)	/	no	/	/	no	/	/	4/12/2014	CM/ResDH(2014)274		6 years, 9 months
Greens and M.T. v. UK	23/11/2010	no	/	/	no	/	/	no	/	/	9/12/2015	CM/ResDH(2015)251		6 years, 8 months
Vasilios Athanasiou and others v. Greece	21/12/2010	yes	Techniki Olympiaki A.E. v Greece	1/10/2013	no	/	/	yes	9/12/2015	CM/ResDH(2015)230	/	/	5 years	
Finger v. Bulgaria	10/05/2011	yes	Balakchiev and others v. Bulgaria	18/02/2013	no	/	/	yes	24/09/2015	CM/ResDH(2015)154	/	/	4 years, 4 months	
Dimitrov and Hamanov v. Bulgaria	10/05/2011	yes	Balakchiev and others v. Bulgaria	18/02/2013	no	/	/	yes	24/09/2015	CM/ResDH(2015)154	/	/	4 years, 4 months	
Ananyev and others v. Russia	10/01/2012	/	/	/	no	/	/	no	/	/	4/03/2013	CM/Del/Dec(2013)1164/24		5 years, 6 months

Name of the case	date of judgment	domestic remedy deemed effective by Court?	judgment/decision concerning domestic remedy	date of Court's decision concerning domestic remedy	case closed for Court?	name of Court's decision closing	date of Court's decision closing	case closed for CoM?	date of CoM resolution to close	number of CoM Resolution to close	pending - date of last interim CoM resolution	pending - number of latest interim CoM Resolution	time between judgments and CoM final resolution	time the case has been pending (until 30 June 2017)
ümmühan Kaplan v. Turkey	20/03/2012	yes	Uzun c. turquie	30/04/2013	no	/	/	yes	17/12/2014	CM/ResDH(2014)298	/	/	2 years, 9 months	
Michelioudakis v. Greece	3/04/2012	/	/	/	no	/	/	yes	9/12/2015	CM/ResDH(2015)231	/	/	3 years, 8 months	
Kuric and others v. Slovenia	26/06/2012	yes	Anastasov and others v. Slovenia	18/10/2016	yes	Anastasov and others v. Slovenia	18/10/2016	yes	25/05/2016	CM/ResDH(2016)112	/	/	3 years, 11 months	
Manushaqe Puto and others v. Albania	31/07/2012	no	/	/	no	/	/	no	/	/	21/09/2017	CM/Del/Dec(2017)1294/H46-1		4 years, 11 months
Glykantzi v. Greece	30/10/2012	no	/	/	no	/	/	yes	9/12/2015	CM/ResDH(2015)231	/	/	3 years, 2 months	
Torregiani and others v. Italy	8/01/2013	yes	Stella et autres c. Italie	16/09/2014	yes	/	/	yes	8/03/2016	CM/ResDH(2016)28	/	/	3 years, 2 months	
M.C. and others v. Italy	3/09/2013	no	/	/	no	/	/	no	/	/	10/12/2015	CM/Del/Dec(2015)1243/H46-10		3 years, 10 months
Gerasimov and others v. Russia	1/07/2014	no	/	/	no	/	/	no	/	/	10/12/2015	CM/Del/Dec(2015)1243/H46-16		3 years
Alisic and others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia	16/07/2014	no	/	/	no	/	/	NO	/	/	11/03/2016	CM/Del/Dec(2016)1250/H46-24		3 years
Neshkov and others v. Bulgaria	27/01/2015	yes	Atanasov and Apostolov v. Bulgaria	27/06/2017	no	/	/	no	/	/	10/03/2017	CM/Del/Dec(2017)1280/H46-9		2 years, 5 months
Varga and others v. Hungary	10/03/2015	no	/	/	no	/	/	no	/	/	11/03/2016	CM/Del/Dec(2016)1250/H46-11		2 years, 4 months
Rutkowski and others v. Poland	7/07/2015	yes	Zaluska and Rogalska v. Poland	22/06/2017	yes	/	/	NO	/	/	/	/		2 years
Gaszo v. Hungary	16/10/2015	no	/	/	NO	/	/	NO	/	/	11/03/2016	CM/Del/Dec(2016)1250/H46-12		1 years, 9 months
W.D. v. Belgium	6/09/2016	no	/	/	no	/	/	no	/	/	10/03/2017	CM/Del/Dec(2017)1280/H46-6		10 months
Rezmiveş and others v. Romania	25/04/2017	no	/	/	no	/	/	no	/	/	/	/		2 months
Lukenda v. Slovenia	6/10/2005	yes	Korenjak v. Slovenia	15/05/2007	no			YES	8/12/2016	CM/ResDH(2016)354	/	/	11 years, 2 months	
Sejdovic v. Italy	1/03/2006	no	/	/	no	/	/	yes	7/06/2016	CM/ResDH(2016)121	/	/	10 years, 3 months	
Scordino (no. 1) v. Italy	29/03/2006	no	/	/	no	/	/	NO	/	/	24/09/2015	CM/Del/Dec(2015)1236/10		

Name of the case	date of judgment	domestic remedy deemed effective by Court?	judgment/decision concerning domestic remedy	date of Court's decision concerning domestic remedy	case closed for Court?	name of Court's decision closing	date of Court's decision closing	case closed for CoM?	date of CoM resolution to close	number of CoM Resolution to close	pending - date of last interim CoM resolution	pending - number of latest interim CoM Resolution	time between judgments and CoM final resolution	time the case has been pending (until 30 June 2017)
Ramadhi and others v. Albania	13/11/2007	no	/	/	no	/	/	no	/	/	21/09/2017	CM/Del/Dec(2017)1294/H46-1		9 years, 8 months
Driza v. Albania	13/11/2007	no	/	/	no	/	/	no	/	/	21/09/2017	CM/Del/Dec(2017)1294/H46-1		9 years, 8 months
Kauczor v. Poland	3/09/2009	no	/	/	no	/	/	YES	4/12/2014	CM/ResDH(2014)268	/	/	5 uears, 3 months	
Orchowski v. Poland	22/10/2009	yes	ŁOMIŃSKI V POLAND	22/10/2010	no	/	/	YES	21/09/2016	CM/ResDH(2016)254	/	/	6 years, 11 months	
M.S.S. v. Belgium and Greece	21/01/2011	no	/	/	NO	/	/	closed v. Belgium; pending v. Greece (only systemic problem v. greece!)	4/12/2014	CM/ResDH(2014)272	7/06/2017	CM/Del/Dec(2017)1288/H46-15	with respect to belgium 3 years, 10 months	with respect to Greece: 6 years, 5 months
Mandic and Jovic v. Slovenia	20/10/2011	yes	Bizjak v. Slovenia	8/07/2014	YES	/	/	NO	/	/	9/06/2016	CM/Del/Dec(2016)1259/H46-32		5 years, 6 months
Strucl and others v. Slovenia	20/10/2011	no	/	/	NO	/	/	NO	/	/	9/06/2016	CM/Del/Dec(2016)1259/H46-32		5 years, 6 monts
Grudic v. Serbia	17/04/2012	no	/	/	NO	/	/	NO	/	/	2/12/2013	CM/Del/Dec(2013)1186/17		5 years, 2 months
Kaverzin v. Ukraine	15/05/2012	no	/	/	NO	/	/	NO	/	/	10/03/2017	CM/Del/Dec(2017)1280/H46-35		5 years, 1 month
Lindheim and others v. Norway	12/06/2012	no	/	/	/	/	/	YES	30/03/2016	CM/ResDH(2016)46	/	/	3 years, 9 months	
Iacov Stanciu v. Romania	24/07/2012	no	/	/	NO	/	/	no	/	/	13/03/2015	CM/Del/Dec(2015)1222/12		4 years, 11 months
Aslakhanova v. Russia	18/12/2012	no	/	/	NO	/	/	NO	/	/	10/03/2017	CM/Del/Dec(2017)1280/H46-24		4 years, 6 months
Oleksandr Volkov v. Ukraine	9/01/2013	no	/	/	NO	/	/	NO	/	/	10/03/2017	CM/Del/Dec(2017)1280/H46-37		4 years 5 months
Vlad and others v. Romania	17/03/2015	no	/	/	NO	/	/	NO	/	/	10/03/2017	CM/Del/Dec(2017)1280/H46-21		2 years, 3 months
Bittó and others v. Slovakia	28/01/2014	no	/	/	NO	/	/	NO	/	/	/	ACTION PLAN SUBMITTED		3 years, 5 months
Grance Stevens and others v. Italy	4/03/2014	no	/	/	/	/	/	NO	/	/	/	ACTION PLAN SUBMITTED		3 years, 4 months
Harakchiev and Tolumov v. Bulgaria	8/07/2014	no	/	/	no	/	/	no	/	/	10/03/2017	CM/Del/Dec(2017)1280/H46-9		3 years
Mansur Yalçin v. Turkey	16/09/2014	no	/	/	/	/	/	NO	/	/	/	INFORMATION AWAITED		2 years, 10 months
S.Z. v. Bulgaria	3/03/2015	no	/	/	NO	/	/	NO	/	/	9/12/2016	CM/Del/Dec(2016)1273/H46-8		2 years, 6 months

Name of the case	date of judgment	domestic remedy deemed effective by Court?	judgment/decision concerning domestic remedy	date of Court's decision concerning domestic remedy	case closed for Court?	name of Court's decision closing	date of Court's decision closing	case closed for CoM?	date of CoM resolution to close	number of CoM Resolution to close	pending - date of last interim CoM resolution	pending - number of latest interim CoM Resolution	time between judgments and CoM final resolution	time the case has been pending (until 30 June 2017)
Yevdokimov and others v. Russia	16/02/2016	no	/	/	/	/	/	NO	/	/	/	INFORMATION AWAITED		1 year, 4 months
Novruk and others v. Russia	15/03/2016	no	/	/	no	/	/	no	/	/	/	action plan submitted		1 year, 3 months
Zherebin v. Russia	24/03/2016	no	/	/	no	/	/	no	/	/	10/03/2017	CM/Del/Dec(2017)1280/H46-25		1 year, 3 months
Holomiov v. Moldava	7/11/2006	no	/	/	NO	/	/	NO	/	/	2/12/2013	CM/Del/Dec(2013)1186/12		10 years, 8 months
Makharadze and Sikharulidze v. Georgia	22/11/2011	no	/	/	/	/	/	NO	/	/	/	awaiting action plan		5 years, 7 months
Konstantin Markin v. Russia	22/03/2012	no	/	/	/	/	/	NO	/	/	/	AWAITING UPDATED ACTION PLAN		5 years, 3 months
Centro Europa 7 S.R.L. and Di Stefano v. Italy	7/06/2012	no	/	/	/	/	/	YES	5/04/2017	CM/ResDH(2017)104	/	/	4 years, 10 months	
Tarakhel v. Switzerland	4/11/2014	no	/	/	/	/	/	YES	11/06/2015	CM/ResDH(2015)96	/	/	7 months	2 years, 7 months
Söro v. Estonia	3/09/2015	no	/	/	/	/	/	NO	/	/	13/02/2017	ACTION REPORT RECEIVED		1 year, 9 months
Mursic v. Croatia	12/03/2015	no	/	/	/	/	/	NO	/	/	/	ACTION PLAN RECEIVED		2 years, 3 months

Legenda:

*kinds of cases

- blue: full pilots
- green: quasi-pilots
- orange: cases in which the court found a systemic issue but no procedural consequence.

* level of cooperation:

- Yellow: state opposed the application of the procedure
- no colour: state did not oppose the procedure
- pink: state welcomed the application of the procedure
- purple: the state recognized the structural nature of the problem.

Annex 5

VI-B DETAILED OVERVIEW OF FULL PILOT CASES - FOCUS ON PERSPECTIVE OF THE COURT (JUNE 2004 - JUNE 2017)

Name of the case	Date of the case	Judges	Registrar	issue	Convention right	reason for PJP
CASE OF BRONIOWSKI v. POLAND	22/06/2004	Mr. L. Wildhaber, president; Mr. C.L. Rozakis, Mr. J.-P. Costa, Mr. G. Ress, Sir Nicolas Bratza, Mrs. E. Palm, Mr L. Caflisch, Mrs V. Stráznicka, Mr. V. Butkevych, mr. B. Zupancic, Mr. J. Hedigan, Mr. M. Pellonpää, mr. A.B. Baka, Pr. R. Maruste, Mr M. Ugrekhelidze, Mr. S. Pavlovschi, Mr. L. Garlicki,	Mr P.J. Mahoney	malfunctioning of Polish legislation and practice caused by the failure to set up an effective mechanism to implement the right to credit of Bug River claimants	article 1 prot. 1 - right to property	80000+ affected + already 167 similar applications pending
CASE OF HUTTEN-CZAPSKA v. POLAND	19/06/2006	Luzius Wildhaber, President,Christos Rozakis,Jean-Paul Costa,Boštjan M. Zupančič,Giovanni Bonello,Françoise Tulkens,Peer Lorenzen,Kristaq Traja,Snejana Botoucharova,Mindia Ugrekhelidze,Vladimiro Zagrebelsky,Khanlar Hajiyev,Egbert Myjer,Sverre Erik Jebens,Davíd Thór Björgvinsson,Ineta Ziemele, Anna Wyrozumska	Lawrence Early, Section Registrar,	Polish restrictive system of rent control without the provision for a procedure enabling landlords to recover losses	article 1 Prot. 1 - right to property	potentially affected persons ranged around 600 000 + 18 similar cases, of which one is filed by an association representing 200 landlords.
CASE OF BURDOV v. RUSSIA (No. 2)	15/01/2009	Christos Rozakis, President,Anatoly Kovler,Elisabeth Steiner,Dean Spielmann,Sverre Erik Jebens,Giorgio Malinverni,George Nicolaou	André Wampach, Deputy Section Registra	non-enforcement or delayed enforcement of final domestic judgments	article 6 - right to a fair trial / article 1 Prot. 1 - right to property / article 13 - right to an effective remedy	already 200 judgments + 'vulnerable victims' (!!!) + previous decision by the Court on the same case + 700 similar cases pending.
CASE OF OLARU AND OTHERS v. MOLDOVA	28/07/2009	Nicolas Bratza, President,Lech Garlicki,Giovanni Bonello,Ljiljana Mijović,David Thór Björgvinsson,Ledi Bianku,Mihai Poalelungi	Lawrence Early, Section Registrar	non-compliance with final domestic judicial decisions ordering the municipal authorities to provide the applicants with social housing	article 1 Prot. 1 - right to Property / article 6 - right to a fair trial	legislation bestowed social housing privileges on a very wide category of persons; however, a chronic lack of resources on the part of the local governments lead to non-enforcement of these rights / 300 pending cases
CASE OF YURIY NIKOLAYEVICH IVANOV v. UKRAINE	15/10/2009	Peer Lorenzen, President,Karel Jungwiert,Rait Maruste,Mark Villiger,Mirjana Lazarova Trajkovska,Zdravka Kalaydjieva,Mykhaylo Buromenskiy	Claudia Westerdiek, Section Registrar	non-execution of final domestic court proceedings	article 6 - right to fair trial / article 13 - right to an effective remedy / article 1 Prot. 1 - right to property	already over 300 similar cases decided since 2004 + approx. 1400 applications pending.
CASE OF SULJAGIC v. BOSNIA AND HERZEGOVINA	3/11/2009	Nicolas Bratza, President,Lech Garlicki,Giovanni Bonello,Ljiljana Mijović,David Thór Björgvinsson,Ledi Bianku,Mihai Poalelungi	Fatoş Aracı, Deputy Section Registrar	structural problem with respect to the repayment scheme for foreign currency deposited before the dissolution of Yugoslavia	art. 1 Prot. 1 - right to property	more than 1350 similar applications currently pending before the court
CASE OF RUMPF v. GERMANY	2/09/2010	Peer Lorenzen, President,Renate Jaeger,Karel Jungwiert,Mark Villiger,Mirjana Lazarova Trajkovska,Zdravka Kalaydjieva,Ganna Yudkivska	Stephen Phillips, Deputy Section Registra	excessive length of proceedings before domestic courts	art. 6 - right to fair hearing within reasonable time / art. 13 - right to an effective remedy	already 40 similar cases (of which 13 in 2009 alone), and some 55 applications still pending + no real initiative has been take domestically.
CASE OF MARIA ATANASIU AND OTHERS v. ROMANIA	12/10/2010	Josep Casadevall, President,Elisabet Fura,Corneliu Bîrsan,Alvina Gyulumyan,Egbert Myjer,Ineta Ziemele,Ann Power	Santiago Quesada, Section Registrar	ineffective restitution of property confiscated during the communist regime in romania / pending cases were adjourned pending national general measures	article 6 - right to a fair trial / article 1 Prot. 1 - right to property	already 150 similar violations found + several hundred pending + several hundred thousands waiting in Romania
CASE OF GREENS AND M.T. v. THE UNITED KINGDOM	23/11/2010	Lech Garlicki, President,Nicolas Bratza,Ljiljana Mijović,David Thór Björgvinsson,Ledi Bianku,Mihai Poalelungi,Vincent Anthony de Gaetano,	Lawrence Early, Section Registrar,	prisoner's right to vote	article 3 Prot 1 - right to free elections / article 13 - right to effective remedy	the state's lenghty delay implementing the Hirst case + "significant number" of repetitive applications before and following the May 2010 general election

Name of the case	Date of the case	Judges	Registrar	issue	Convention right	reason for PJP
CASE OF VASSILIOS ATHANASIOU AND OTHERS v. GREECE	21/12/2010	Nina Vajić, présidente,Christos Rozakis,Khanlar Hajiyev,Dean Spielmann,Sverre Erik Jebens,Giorgio Malinverni,George Nicolaou	Søren Nielsen, greffier de section	excessive length of administrative proceedings	art. 6 - right to a fair trial / art. 13 - right to an effective remedy	already 300 similar judgments + more than 200 currently pending
CASE OF FINGER v. BULGARIA	10/05/2011	Nicolas Bratza, President,Lech Garlicki,Ljiljana Mijović,Päivi Hirvelä,Ledi Bianku,Zdravka Kalaydjieva,Nebojša Vučinić	Fatoş Aracı, Deputy Section Registrar,	excessive lenghth of civil proceedings	article 6 - right to a fair trial / article 13 - right to an effective remedy	50 cases already decided and 500 pending
CASE OF DIMITROV AND HAMANOV v. BULGARIA	10/05/2011	Nicolas Bratza, President,Lech Garlicki,Ljiljana Mijović,Päivi Hirvelä,Ledi Bianku,Zdravka Kalaydjieva,Nebojša Vučinić	Fatoş Aracı, Deputy Section Registrar,	excessive lenghth of criminal proceedings	article 6 - right to a fair trial / article 13 - right to an effective remedy	already 80 similar judgments + 200 similar applications pending
CASE OF ANANYEV AND OTHERS v. RUSSIA	10/01/2012	Nina Vajić, President,Anatoly Kovler,Peer Lorenzen,Mirjana Lazarova Trajkovska,Julia Laffranque,Linos-Alexandre Sicilianos,Erik Møse	Søren Nielsen, Section Registrar,	inhuman and degrading treatment in pre-trial detention	article 3 - prohibition of inhuman or degrading treatment or punishment / article 13 - right to an effective remedy	already 80 similar judgments + 250 similar applications pending
CASE OF ÜMMÜHAN KAPLAN v. TURKEY	20/03/2012	Françoise Tulkens, présidente,Danutė Jočienė,Isabelle Berro-Lefèvre,András Sajó,Işıl Karakaş,Paulo Pinto de Albuquerque,Helen Keller	Stanley Naismith, greffier de section,	length of judicial proceedings	article 6 - right to fair trial / article 13 - right to an effective remedy	over 2700 applications stemming from the same issue pending
CASE OF MICHELIOUDAKIS v. GREECE	3/04/2012	Nina Vajić, présidente,Anatoly Kovler,Peer Lorenzen,Elisabeth Steiner,Mirjana Lazarova Trajkovska, Linos-Alexandre Sicilianos,Erik Møse	André Wampach, greffier adjoint de secti	excessive lenghth of criminal proceedings	article 3 - prohibition of torture and inhuman or degrading treatment	more than 300 cases already decided + chronic and persistent nature of the problem + more than 250 pending
CASE OF KURIĆ AND OTHERS v. SLOVENIA	26/06/2012	Nicolas Bratza, President,Jean-Paul Costa,Françoise Tulkens,Nina Vajić,Dean Spielmann,Boštjan M. Zupančič,Anatoly Kovler,Elisabeth Steiner,Isabelle Berro-Lefèvre,Päivi Hirvelä,George Nicolaou,Luis López Guerra,Zdravka Kalaydjieva,Nebojša Vučinić,Guido Raimondi,Ganna Yudkivska,Angelika Nußberger,	Vincent Berger, Jurisconsult	following Slovenia's declaration of independence in 1991, a large group of persons were "erased" from the Slovenian Register of Permanent Residents, causing them extreme hardship for over 20 years.	article 8 - respect for private and family life / article 13 - right to an effective remedy / article 14 - prohibition of discrimination	number of "erased" people: 25671 / although only a small number of pending cases, the Court was mindful of the potential inflow of future similar cases.
CASE OF MANUSHAQE PUTO AND OTHERS v. ALBANIA	31/07/2012	Ineta Ziemele, President,Päivi Hirvelä,George Nicolaou,Ledi Bianku,Nona Tsotsoria,Zdravka Kalaydjieva,Paul Mahoney	Françoise Elens-Passos, Section Registrar	non-enforcement of administratiove decisions awarding compensation for property confiscated under the communist regime	article 13 - right to an effective remedy / article 6 - right to a fair trial / article 1 Prot. 1 - right to property	20 applicants + 80 cases pending + possibility for more
CASE OF GLYKANTZI v. GREECE	30/10/2012	Nina Vajić, présidente,Peer Lorenzen,Elisabeth Steiner,Mirjana Lazarova Trajkovska,Julia Laffranque,Linos-Alexandre Sicilianos,Erik Møse	Søren Nielsen, greffier de section,	excessive lenghth of civil proceedings	article 6 - right to a fair trial / article 1 Prot. 1 - right to property / article 13 - right to an effective remedy	already more than 300 similar cases decided + persistent nature of the problem + significant number of affected individuals and need to provide them with swift and appropriate address at the national level + 250 applications pending.
CASE OF TORREGGIANI AND OTHERS v. ITALY	8/01/2013	Danutė Jočienė, présidente,Guido Raimondi,Peer Lorenzen,Dragoljub Popović,Işıl Karakaş,Paulo Pinto de Albuquerque,Helen Keller	Stanley Naismith, greffier de section	overcrowding in prisons	article 3 - prohibition of inhuman or degrading treatment or punishment / article 13 - right to an effective remedy	proof of structural issue: the terms of the declaration of a national state of emergency issued by the italian Prime minister in 2010 ; and several hundred applications pending
CASE OF M.C. AND OTHERS v. ITALY	3/09/2013	Danutė Jočienė, présidente,Guido Raimondi,Peer Lorenzen,Dragoljub Popović,Işıl Karakaş,Nebojša Vučinić,Paulo Pinto de Albuquerque	Stanley Naismith, greffier de section	impossibility for infected persons to obtain an annual adjustment of the supplementary part of a compensation allowance paid to them following accidental contamination as a result of blood transfusions or the administration of blood derivatives.	article 6 - right to a fair trial / article 1 Prot. 1 - right to property / article 14 - prohibition of discrimination	162 infected persons in this case, however "un millier de réquerants" are involved / authorities' unwillingness to adjust the compensation, including after the Constitutional Court's judgment.

Name of the case	Date of the case	Judges	Registrar	issue	Convention right	reason for PJP
CASE OF GERASIMOV AND OTHERS v. RUSSIA	1/07/2014	Isabelle Berro-Lefèvre, President,Elisabeth Steiner,Khanlar Hajiyev,Mirjana Lazarova Trajkovska,Julia Laffranque,Ksenija Turković,Dmitry Dedov	Søren Nielsen, Section Registrar,	excessive delays in the enforcement of court decisions providing the applicants housing and utility services	article 6 - right to a fair trial / article 13 - right to an effective remedy / article 1 Prot. 1 - right to property	non-enforcement or delayed enforcement of judicial decisions led to the most frequent violations by Russia + already more than 150 similar cases decided + chronic incapacity of resources of the government to comply with obligation to provide compensation in
CASE OF ALIŠIĆ AND OTHERS v. BOSNIA AND HERZEGOVINA, CROATIA, SERBIA, SLOVENIA AN	16/07/2014	Dean Spielmann, President,Josep Casadevall,Guido Raimondi,Ineta Ziemele,Mark Villiger,Isabelle Berro-Lefèvre,David Thór Björgvinsson,Danutė Jočienė,Dragoljub Popović,Päivi Hirvelä,Mirjana Lazarova Trajkovska,Ganna Yudkivska,Angelika Nußberger,Linos-Alexandre Sicilianos,André Potocki,Faris Vehabović,Ksenija Turković	Michael O'Boyle, Deputy Registrar,	inability to recover "old" foreign-currency savings, deposited with two banks in what is now Bosnia and Herzegovina, following the dissolution of the former Socialist Federal Republic of Yusoslavia	article 1 Prot. 1 - right to property / article 13 - right to an effective remedy	more than 1850 similar applications pending, introduced on behalf of more than 8000 applicants.
CASE OF NESHKOV AND OTHERS v. BULGARIA	27/01/2015	Ineta Ziemele, President,Päivi Hirvelä,George Nicolaou,Nona Tsotsoria,Zdravka Kalaydjieva,Krzysztof Wojtyczek,Faris Vehabović	Françoise Elens-Passos, Section Registrar,	inhuman and degrading detention conditions and the related lack of effective remedies	article 3 - prohibition of inhuman or degrading treatment or punishment / article 13 - right to an effective remedy	already 20+ similar cases decided and 40+ cases on the same issue pending
CASE OF VARGA AND OTHERS v. HUNGARY	10/03/2015	Işıl Karakaş, President,András Sajó,Nebojša Vučinić,Helen Keller,Egidijus Kūris,Robert Spano,Jon Fridrik Kjølbro	Stanley Naismith, Section Registrar	overcrowding in prisons	art 3 - prohibition of inhumand and degrading treatment / art. 13 - right to an effective remedy	similar to previous cases + approximately 450 similar cases pending + at the end of 2013 over 5000 inmates were held in Hungarian prisons on
CASE OF RUTKOWSKI AND OTHERS v. POLAND	7/07/2015	Guido Raimondi, President, Päivi Hirvelä, Ledi Bianku, Nona Tsotsoria, Paul Mahoney, Krzysztof Wojtyczek, Faris Vehabović	Françoise Elens-Passos, Section Registrar	lenghty court proceedings and inadequate victim compensation	article 6 - right to a hearing within a reasonable time / article 13 - right to an effective remedy	facts reveal a systemic issue + already 280 cases decided + already 358 under friendly settlement + 650 similar cases pending
CASE OF GAZSÓ v. HUNGARY	16/07/2015	Işıl Karakaş, President, András Sajó, Nebojša Vučinić, Helen Keller, Paul Lemmens, Egidijus Kūris, Jon Fridrik Kjølbro	Stanley Naismith, Section Registrar	excessive length of civil proceedings	article 6 - right to a fair trial / article 13 - right to an effective remedy	more than 200 violations found already and 400 more pending / no improvements made despite the court's consistent case-law on the matter.
CASE OF W.D. v. BELGIUM	6/09/2016	Işıl Karakaş, présidente,Julia Laffranque,Nebojša Vučinić,Paul Lemmens,Ksenija Turković,Jon Fridrik Kjølbro,Stéphanie Mourou-Vikström,	Hasan Bakırcı,Deputy Section Registrar	detention of offenders with mental disorders in a prison environment unsuited to their therapeutic needs	article 3 - prohibition of inhuman or degrading treatment or punishment /article 5 - right to liberty and security and habeas corpus / article 13 - right to an effective remedy	at the time some 50 cases pending, the number of applications was constantly increasing
CASE OF REZMIVES AND OTHERS v. ROMANIA	25/04/2017	Ganna Yudkivska, présidente, Vincent A. De Gaetano, Nona Tsotsoria, Paulo Pinto de Albuquerque, Krzysztof Wojtyczek, Iulia Motoc, Marko Bošnjak,	Marialena Tsirli, Section Registrar	detention conditions	article 3 - prohibition of inhuman or degrading treatment or punishment	already similar violations found since 2007 and incoming cases have not ceased to come in + reference to Iacov Stanciu (quasi-pilot), CoM has evaluated the measures proposed by Romanian government as ineffective and requested additional measures. + CPT reports => persistance of the problem

Annex 6

VI-C DETAILED OVERVIEW OF FULL PILOT CASES - EFFICIENCY FACTORS (JUNE 2004 - JUNE 2017)

name of the case	date of the case	date of application	date of decision PJP	total length of proceedings	number of similar cases already resolved	number of pending cases	other reasons for PJP	identifiable group
Broniowski v. poland	22/06/2004	12/03/1996	26/03/2002 the Chamber decided to adjourn all similar pending cases	8 years, 3 months	/	167	80000+ affected => threat to the Court's machinery	Bug River People
Hutten-Czapska v. Poland	19/06/2006	6/12/1994	4/10/2004: no submissions were asked from the parties.	11 years, 6 months			the operation of rent-control schemes may potentially affect some 100000 landlords and some 600000 to 900000 tenants (para 191).	landlords
Burdov v. Russia (no. 2)	15/01/2009	15/07/2004	3/07/2008	4 years, 6 months	200	700	Court already decided cases on this point, some of which had come out before the violation against the head applicant in this case => flagrant violation of article 46 ECHR. (para 134)	/
Olaru and others v. Moldova	28/07/2009	11/12/2006; 31/05/2005; 2/04/2008; 3/01/2007	1/07/2008	2 years, 6 months -4 years, 2 months	not specified	300	lack of funds to enforce the previous decisions by the Court + to actually solve the problem domestically (even without involvement of the Court) + acknowledgment by the Government that this is a structural problem (para. 56).	different categories of persons who receive social housing provileges
Yuriy Nikolayevich Ivanov v. Ukraine	15/10/2009	13/09/2004	25/11/2008	5 years, 1 month	more than 300 (para 83).	1400	the case concerns a recurring problem (prolonged non-enforcement of final decisions). More than half of the Court's judgments concerning Ukraine deal with this issue. + in line with Burdov: "the Court considers it appropriate to apply the pilot-judgment procedure in the present case, given notably the recurrent and persistent nature of the underlying problems, the large number of people affected by them in Ukraine and the urgent need to grant them speedy and appropriate redress at domestic level." (para 81)	/
Suljagic v. Bosnia and Herzegovina	3/11/2009	2/07/2002	not clear	6 years, 7 months	/	1350, on behalf of more than 13500 => serious threat to the future functioning of the machinery of the Court.	affects large number of people: more than 1/4 of the Bosnian population had "old" foreign-currency savings.	/
Rumpf v. Germany	2/09/2010	10/11/2006	24/11/2009	3 years, 10 months	more than 40 (para 64)	55	more than half of the Court's judgments against germany concern excessive lenght of judicial proceedings + in previous case, the Court had already drawn Germany's attention to article 46 and its obligation to execute the Court's judgments. + in line with Yuriy Nikolayevich v. Ukraine: "the Court considers it appropriate to apply the pilot judgment procedure in the present case, given notably the recurrent and persistent nature of the underlying problems, the number of people affected by them in Germany and the need to grant them speedy and appropriate redress at domestic level."	/

name of the case	date of the case	date of application	date of decision PJP	total length of proceedings	number of similar cases already resolved	number of pending cases	other reasons for PJP	identifiable group
Maria Atanasiu and others v. Romania	12/10/2010	11/08/2005; 4/08/2004	not clear	5 years, 2 months-6 years, 2 months	150	"several hundred" para 217 => "aggravating factor concerning the state's responsibility" + threat to functioning of court's machinery	several hundred thousands affected waiting in Romania	/
Greens and M.T. v UK	23/11/2010	14/11/2008	July 2010	2 years	/	2500	with each election, numbers of potential applications go up; at any one time there are approximately 70000 serving prisoners in the UK (para 111)	yes: prisoners
Vasilios Athanasiou and others v. Greece	21/12/2010	6/10/2008	24/09/2009	2 years, 2 months	300	200+	para 44: "Partant, la Cour estime qu'il y a lieu d'appliquer en l'espèce la procédure d'arrêt pilote, compte tenu notamment du caractère chronique et persistant des problèmes en question, du nombre important de personnes qu'ils touchent en Grèce et du besoin urgent d'offrir à celles-ci un redressement rapide et approprié à l'échelon national"	no (para 43)
Finger v. Bulgaria	10/05/2011	6/10/2005	23/02/2010	6 years, 5 months	50 (the Court specifically mentions that 43 of those were resolved via friendly settlements or were struck out of the list after a unilateral declaration by the Gov't)	500	specific "diagnose" of Bulgaria's problem	/
Dimitrov and Hamanov v. Bulgaria	10/05/2011	10/11/2006; 6/01/2009	23/02/2010	2 years, 4 months-4 years, 7 months	80+ (the Court specifically mentions that 41 of these cases were resolved via friendly settlement or were struck out of the list after a unilateral declaration by the Gov't)	200	specific "diagnose" of Bulgaria's problem	/
Ananyev and others v. russia	10/01/2012	14/09/2007	14/05/2009	4 years, 4 months	80+	250	structural problem remains capable of affecting a large number of individuals who have been detained in remand centres across Russia (para 186) + para 187: ameliorating the "practically inhuman prison conditions" was one of the accession commitments Russia ondertook to implement when joining the CoE . para 190: "Taking into account the recurrent and persistent nature of the problem, the large number of people it has affected or is capable of affecting, and the urgent need to grant them speedy and appropriate redress at the domestic level" + Based on number of decided and pending cases + Resolutions of the Parliamentary Assembly, report by the Monitoring Committee, Interim Resolution on the execution of the Kalashnikov judgment of the Committee of Ministers + no denial by Russian authorities.	detainees
Ümmühan Kaplan v. Turkey	20/03/2012	23/05/2007	6/12/2011	4 years, 10 months	/	330 communicated applications and 2373 non-communicated applications.	potential number of affected persons and judgments following from this + Committee of Ministers had 233 cases concerning length of proceedings with respect to Turkey in 2011.	/

name of the case	date of the case	date of application	date of decision PJP	total length of proceedings	number of similar cases already resolved	number of pending cases	other reasons for PJP	identifiable group
Michelioudakis v. Greece	3/04/2012	4/09/2010	2/12/2010	1 year, 7 months	300	250+	chronic and persistent character of the problems and the important number of affected persons + big number of caes in the intermediate resolution of the committee of ministers of 2007 + the chronic problem was already recognized in another pilot case concerning Greece (Vassilios Athanasiu) + committee of ministers + other pilot	no identifiable class of citizens (para 63).
Kuric and others v. Slovenia	26/06/2012	4/07/2006	not clear	5 years, 11 months	/	/	number of erased people: 25671; small number of pending cases but big possible influx. "It is inherent in the Court's findings that the violation of the applicants' rights guaranteed by Articles 8 and 13 of the Convention originates in the failure of the Slovenian legislative and administrative authorities" (para 402 Chamber Judgment)	the erased
Manushaqe Puto and others v. Albania	31/07/2012	16/11/2006	not clear	5 years, 8 months	/	number not indicated	violations despite previous cases + worry concerning the high number of potential incoming cases => threat to Convention machinery + number of pending cases + statistiscs provided by the Gov't	/
Glykantzi v. Greece	30/10/2012	9/07/2009	2/12/2010	3 years, 2 months	300+	250+	the case concerns excessive lenght of proceedings, which has been the subject of other pilots (against other countries f.i. Scordino, Burdov and Lukenda), therefore the Court finds it appropriate to apply the PJP here as well (para 67) + resolution of CoM concerning large number of similar cases against Greece + already a previous pilot case	no identifiable class of citizens
Torregiani and others v. Italy	8/01/2013	seven applications, between 08/2009 and 07/2010	5/06/2012	3 years, 5 months-2 years, 6 months	/	"several hundred"	statistics + the terms of the declaration of a national state of emergency issued by the italian Prime minister in 2010 + the number of potential affected persons + the need to offer urgent redress at the national level.	prisoners
M.C. and others v. Italy	3/09/2013	29/11/2010	10/06/2011	2 years, 10 months	/	approximately 50, each representing groups of applicants => total of "un millier de requérants"	"des milliers de personnes ont introduit des recours internes" + the practice affects or is able to affect in the future a large number of peole. + the urgent need to offer redress.	persons infected after blood transfusions
Gerasimov and others v. Russia	1/07/2014	11 applications between 07/2005 and 08/2011	10/04/2012	2 years, 11 months - 9 years	150	600	differentiated sample of applications was joined in this pilot => shows that the underlying problems are widespread and the need for effective solutions urgent (para 213) + blatant refusal of the state to enforce court decisions+ the nature of the underlying problems, the number of persons affected and the urent need to grant them speedy an appropriate redress.	persons who were granted housing and utiliy services by court decision
Alisic and others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia	16/07/2014 (GC) 6/11/2012(Ch)	30/07/2005	not clear	9 years	/	1650+, introduced on behalf of 8000+ applicants.	/	holders of old currency savings

name of the case	date of the case	date of application	date of decision PJP	total length of proceedings	number of similar cases already resolved	number of pending cases	other reasons for PJP	identifiable group
Neshkov and others v. Bulgaria	27/01/2015	six applications between 06/2010 and 12/2012	20/03/2014	2 years, 1 month - 4 years, 7 months	25+	almost 40 prima facie meritorious applications	underlying facts in all decided cases were similar + widespread problem resulting from malfunctioning of the Bulgarian penitentiary system can be seen from the Committee of Minister's decisions concerning the enforcement of the previous decision + problem had affected and remains capable of affecting in the future large numbers of people + although the Government didn't recognize the structural nature of the problem, it did concede that conditions in a number of facilities were deficient (but working on it). The penitentiary authority of Bulgaria however accepted that the penitentiary system was justifiably being critized on a number of points + CPT report + annual report of the Bulgaria Ombudsman + report by Bulgarian Helsinki Committee + 2014 McManus Report + statistical date of the government + "potential inflow of future cases" + fact that the problem has persisted for many years	detainees
Varga and others v. Hungary	10/03/2015	six applications between March and October 2013	23/09/2014	2 years - 1 year and 5 months	4	450	"recurrent and persistent nature of the proble + large number of people affected or capable of affecting + urgent need to grant them speedy and appropriate redress"	detainees
Rutkowski and others v. Poland	7/07/2015	30/11/2010; 21/02/2011; 21/07/2011	2/10/2012 suitability communicated	4 years, 8 months - 4 years	280	at least 100 per year since 2004; 650 pending Polish cases involving a similar complaint	300 cases still pending before the Committee of Ministers + huge inflow of cases in the national courts	/
Gazso v. Hungary	16/07/2015	24/07/2012	13/11/2014	3 years	200	400	"in line with its approach in ümmühan Kaplan v Turkey: recurrent and persistent nature of the underlying problems, the number of people affected by them and the need to grant them speedy and appropriate redress" + problems have persisted in the four years that have elapsed since the reforms mentioned by the government	/
W.D. v. Belgium	6/09/2016	28/10/2013	not clear	2 years, 11 months	/	50 (constantly increasing)	pilot follows a number of principled judgments on the same issue+ structural nature of the issue is not denied by the Government + standard phrasing: "eu égard au nombre de personnes potentiellement concernées en belgique et aux arrêts de violation auxquels les requêtes en question pourraient donner lieu" (para 166).	detainees with mental disability
Rezmives v. Romania	25/04/2017	four applications between 14/09/2012 and 15/10/2013	15/09/2015	4 years, 7 months - 3 years, 6 months	150	3200	Already similar cases in 2007: to date 150 similar judgments had been rendered. The constant increase lead to a previous quasi-pilot (Iacov Stanciu v. Romania in 2012). The problem was still not solved after this quasi pilot.	detainees

Annex 7

VI-D DETAILED OVERVIEW OF FULL PILOT CASES - FOCUS ON THE PERSPECTIVE OF THE APPLICANTS (JUNE 2004 - JUNE 2017)

name of the case	date of the case	lawyers	ngo involvement	third party interventions	vulnerable applicants	legal aid involvement	convention right
Broniowski v. poland	22/06/2004	Mr. Z. Cichón (cracow); Mr. W. Hermelinski (Warsaw)	no	no	no	yes	article 1 protocol 1 - right to property
Hutten-Czapska v. Poland	19/06/2006	Mr. B Sochanski (Szczecin)	no	no	no	no	article 1 Prot. 1 - right to property
Kovacic and others v. Slovenia	3/10/2008	Mr. M. Zugic and Mr . Z. Nogolica	no	Croatian government based on right to intervene (art. 36§1 ECHR; Rule 44§1(b)).	/	no	article 1 Prot. 1 - right to property
Burdov v. Russia (no. 2)	15/01/2009	Mr N.A. Kravtsov (in the original case; no mention in the no. 2 case)	no	no	yes para 133 (part of the victims pool)	yes	article 6 - right to a fair trial / article 1 Prot. 1 - right to
Olaru and others v. Moldova	28/07/2009	Mr A Tanase, Mr F. Nagacevschi, Ms. J Hanganu and Mr. A Bizgu (Chisinau).	no	no		no	article 1 Prot. 1 - right to Property / article 6 - right to a
Yuriy Nikolayevich Ivanov v. Ukraine	15/10/2009	I. Pogasiy (Kirovograd)	no	no		no	article 6 - right to fair trial / article 13 - right to an
Suljagic v. Bosnia and Herzegovina	3/11/2009	no mention	no	Association for the Protection of Foreign-Currency Savers in Bosnia and Herzegovina; the Association for the Return of Foreign-Currency Savings in Bosnia and Herzegovina and Diasproa			art. 1 Prot. 1 - right to property
Rumpf v. Germany	2/09/2010	Mr. S. Schill (Wetzlar)	no	no		yes	art. 6 - right to fair hearing within reasonable time / art. 13 - right to an effective remedy
Maria Atanasiu and others v. Romania	12/10/2010	Mr C-L Popescu, Mr. C-R Popescu, Ms R-A Niculescu-Gorpin and Ms M Niculescu-Gorpin (Bucharest)	no	Asociaţia pentru Proprietatea Privată and ResRo Interessenvertretung Restitution in Rumänien		no	article 6 - right to a fair trial / article 1 Prot. 1 - right to property
Greens and M.T. v UK	23/11/2010	Mr. T Kelly (Coatbridge) (of Taylor & Kelly - law firm specialized in HR)	no/specialized law firm (Taylor & Kelly)	Equality and Human Rights Commission	no	no	article 3 Prot 1 - right to free elections / article 13 - right to effective remedy
Vasilios Athanasiou and others v. Greece	21/12/2010	Mr. N Anagnostopoulos and A. Psyha	?	no		no	art. 6 - right to a fair trial / art. 13 - right to an effective
Finger v. Bulgaria	10/05/2011	Mr. M. Ekimdzhiev and Ms G. Chernicherska (Plovdiv)	?	no		no	article 6 - right to a fair trial / article 13 - right to an
Dimitrov and Hamanov v. Bulgaria	10/05/2011	A. Atanasov (Plovdiv) and Mr. Ekimdzhiev and Ms. K Boncheva (Plovdiv)	?	no		no	article 6 - right to a fair trial / article 13 - right to an effective remedy

name of the case	date of the case	lawyers	ngo involvement	third party interventions	vulnerable applicants	legal aid involvement	convention right
Ananyev and others v. russia	10/01/2012	Mr. O Preobrazhenskaya (legal specialist resident in strasbourg!); Mr. A Anokhin (astrakhan).	Oksana Probrazhenskaya: director of the Centre for International Protection (Russian branch of International Commission of Jurists); it's something between an NGO and a specialized law firm.	no	no	no	article 3 - prohibition of inhuman or degrading treatment or punishment / article 13 - right to an effective remedy
Ümmühan Kaplan v. Turkey	20/03/2012	Ms G. Kiratli (Ankara)	no	no		no	article 6 - right to fair trial / article 13 - right to an effective remedy
Michelioudakis v. Greece	3/04/2012	Ms. V Chirdaris	no	no	no	no	article 6 and article 13 - excessive length of proceedings
Kuric and others v. Slovenia	26/06/2012	Mr A.G. Lana and Mr. A Saccucci (Rome) and Ms A Ballerini and Ms. M Vano (genoa)	The Peace Institute (http://www.mirovni-institut.si/en/attorneys-andrea-saccucci-and-anton-giulio-lana-italy-and-the-peace-institute-slovenia-received-pilnets-2012-european-pro-bono-award-for-exemplary-partnership-in-the-public-interest/)	Serbian government; Equal Rights Trust; Open Society Justice Initiative; the Peace Institute - Institute for Contemporary Social and Political Studies; and the Legal Information Centre of Non-Governmental Organisations. In GC case: UNHCR and Open Society Justice Initiative.	yes (the 'erased' - aka statelessness - para 412 of GC judgment).	no	article 8 - respect for private and family life / article 13 - right to an effective remedy / article 14 - prohibition of discrimination
Manushaqe Puto and others v. Albania	31/07/2012	Mr. S Puto and Mr. A Tartari (Tirana)	no	no		no	article 13 - right to an effective remedy / article 6 - right to a fair trial / article 1 Prot. 1 - right to property
Glykantzi v. Greece	30/10/2012	Ms. L. Panousis and Ms. A Panousi	no	no		no	article 6 - right to a fair trial / article 1 Prot. 1 - right to property / article 13 - right to an effective remedy
Torregiani and others v. Italy	8/01/2013	Ms. F. Urciuoli, Ms P. Rodi, Mr. Giuseppe Rossodivita	no	no	in general "dans certains cas" for prisoners: vulnerability para. 65; vulnerability of persons under control of the state para 72	no	article 3 - prohibition of inhuman or degrading treatment or punishment / article 13 - right to an effective remedy
M.C. and others v. Italy	3/09/2013	M. Dragone and C. Defilippi (Mestre and Milan)	no	no	no	no	article 6 - right to a fair trial / article 1 Prot. 1 - right to property / article 14 - prohibition of discrimination

name of the case	date of the case	lawyers	ngo involvement	third party interventions	vulnerable applicants	legal aid involvement	convention right
Gerasimov and others v. Russia	1/07/2014	E. Mezak (Syktyvkar), A. Vologin (Volsk)	no	no		no	article 6 - right to a fair trial / article 13 - right to an effective remedy / article 1 Prot. 1 - right to property
Alisic and others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia	16/07/2014 (GC)	B. Mujcin, Mr. E. Eser, Mr. A Mustafic	no	no		no	article 1 Prot. 1 - right to property / article 13 - right to an effective remedy
Neshkov and others v. Bulgaria	27/01/2015	only one applicant was represented, by Ms. D Fartunova	lawyer working with Bulgarian Helsinki Committee	Bulgarian Lawyers for Human Rights and Bulgarian Helsinki Committee	Mr. Zlatev, one of the applicants and still in the penitentiary facilities, was "particularly vulnerable" which warranted specific individual measures, para. 292 +302.	no	article 3 - prohibition of inhuman or degrading treatment or punishment / article 13 - right to an effective remedy
Varga and others v. Hungary	10/03/2015	T. Fazekas, D. Karsai, A Cech, A nemesszeghy and G. Magyar (Budapest) and Mr. Kovacs (Szeged).	no	no	no	no	art 3 - prohibition of inhumand and degrading treatment / art. 13 - right to an effective remedy
Rutkowski and others v. Poland	7/07/2015	Mr. A Bodnar and Ms. I Pacho; Mr. M. Kowalczyck; Ms. A Dawidowska	first two lawyers working for the Helsinki Foundation for Human Rights	no	no	no	article 6 - right to a hearing within a reasonable time / article 13 - right to an effective remedy
Gazso v. Hungary	16/07/2015	D. Karsai (Budapest)	no	no		no	article 6 - right to a fair trial / article 13 - right to an effective remedy
W.D. v. Belgium	6/09/2016	P. Verpoorten (Herentals)	no	no	yes (as a mentally ill person, para 106).	no	article 3 - prohibition of inhuman or degrading treatment or punishment /article 5 - right to liberty and security and habeas corpus / article 13 - right to an effective remedy
Rezmives and others v. Romania	25/04/2017	first applicant by M.C. Boncea (Bucarest), third applicant by N.T. Popescu (Bucarest). Second and fourth applicant represented themselves.	no	no	yes, in general as for all detainees (para 72).	no	article 3 - prohibition of inhuman or degrading treatment.

Annex 8

VI-E OVERVIEW OF QUASI-PILOT CASES (2004 - 2017) [1032]

name of the case	date of the case	issue	convention rights	reason for systemic	representation for the applicant	ngo involvement	third party interventions	vulnerable applicants
Lukenda v Slovenia	6/10/2005	excessive length of proceedings + no effective remedy	article 6 + article 13	persistent backlog in slovenian courts + 500 pending similar cases	Verstovšek lawyers	no	no	
Sejdovic v Italy	01/03/2006 (GC)	convictions in absentia without opportunity to present a defence	article 6	Chamber: malfunctioning of domestic legislation + lack of an effective mechanism; Grand Chamber: waiting for the domestic application of a new law.	Mr B. Bartholdy, a lawyer practising in Westerstede (Germany)	no	Slovakian government	
Scordino v. Italy (no. 1)	29/03/2006 (GC)	length and unfairness of proceedings + interference with peaceful enjoyment of property	article 6 + article 1 Protocol 1	malfunctioning of domestic legislation as to right to property; as to excessive lenghth of proceedingsl hundreds of similar cases currently pending	Mr N. Paoletti,	no	Polish, Czech and Slovakian Governments	
Ramadhi and others v. Albania	13/11/2007	non-enforcement of domestic decisions that awarded compensation for land acquisition	article 1 Prot. 1 + art. 6 + art. 13	already dozens of identical applications before the Court; legal vacuums detected in this case may give rise to other applications	O. Muçollari	no	no	
Driza v. Albania	13/11/2007	non-enforcement of domestic decisions that awarded compensation for land acquisition	art. 6 + art. 13	already dozens of identical applications before the Court; legal vacuums detected in this case may give rise to other applications	A. Driza-Maurer	no	no	
Kauczor v. Poland	3/02/2009	pre-trial detention exceeding reasonable time + unreasonable length of criminal proceedings	article 5 + aticle 6	already considerable amount of similar cases decided	Mr I. Płaza	no	no	

[1032] It must however be emphasized that these charts are not exhaustive. It is possible that there are other cases which the Court internally regards as quasi-pilot case while they are not identifiable as such in the case law.

name of the case	date of the case	issue	convention rights	reason for systemic	representation for the applicant	ngo involvement	third party interventions	vulnerable applicants
Orchowksi v. Poland	22/10/2009	inhuman and degrading detention conditions + overcrowding in contravention to right to physical integrity	article 3 + article 8	160 applications concerning overcrowding currently pending + structural nature of problem was acknowledged by Constitutional Court + statistical data	Ms K. Burska	no	no	para 120 + 151: in general "prisoners are in a vulnerable position".
M.S.S. v Belgium and Greece	21/01/2011 (GC)	expulsion from Belgium to Greece, following EU Dublin II regulations, in contravention to right to life and right to freedom from torture and inhuman or degrading treatment + complaint that he had been subject to such ill-treatment in Greece	Article 2 + article 3 + article 13	para 401: implicitly. Living conditions of asylum-seekers in Greece + prolonged period of uncertainty and lack of prospect for improvement => article 3 violation + shortcomings in the asylum procedure and risk of refoulement => article 3 juncto 13.	Mr. Z. Chihaoui (founder of specialized HR law firm - de facto strategic litigation).	specialized law firm	the Netherlands and the United Kingdom Governments, the Centre for Advice on Individual Rights in Europe (the AIRE Centre), Amnesty International, the Council of Europe Commissioner for Human Rights, the Office of the United Nations High Commissioner for Refugees (UNHCR) and the Greek Helsinki Monitor. The Netherlands and the United Kingdom Governments, the Commissioner and the UNHCR were also authorised to take part in the oral proceedings.	yes! Applicant was particularly vulnerable due to his status as an asylum-seeker because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously. (para 232.) ; asylum-seekers are a particularly underpriviliged and vulnerable group (para. 251)
Mandic and Jovic v. Slovenia	20/10/2011	bad prison conditions and no effictive remedy	article 3 + article 8 + article 13.	No structural problem!! overcrowding in Ljubljana prison over a number of years. However, the Court cannot conclude that there exists a structural problem consisting of “a practice that is incompatible with the Convention” nationwide.	Odvetniška Družba Matoz O.P. D.O.O., a law firm practising in Koper	no	no	in general "prisoners are in a vulnerable position" (para 22).
Strucl and others v. Slovenia	20/10/2011	bad prison conditions and no effictive remedy	article 3 + article 8 + article 13.	No structural problem. Contrary to Mandic and Jovic: "The Court is aware that the solving of the overcrowding may necessitate the mobilisation of significant financial resources, in particular as the problem is not limited to Ljubljana prison, but exists, though to a lesser extent, in most of the closed prison facilities in the country." (para. 139). However, the Court still concludes that there is no structural problem (with the same exact sentence - para. 140).	Odvetniška Družba Matoz O.P. D.O.O., a law firm practising in Koper	no	no	no

name of the case	date of the case	issue	convention rights	reason for systemic	representation for the applicant	ngo involvement	third party interventions	vulnerable applicants
Grudic v. Serbia	17/04/2012	applicants had not been paid their disability pensions for years	article 1 Protocol 1	large number of potential applicants + relevant laws have not been implemented	R. Garibović	no	no	no
Kaverzin v Ukraine	15/05/2012	torture by police, lack of effective investigation, inadequate medical assistance an detention conditions	article 3	structural problem with respect to lack of adequate medical facilities (para. 131); systemic issues of ill-treatment by police and no effective remedy (40+ cases already decided + 100+ pending; para. 172);	/	no	no	yes! Para 174: " criminal suspects appear to be one the most vulnerable group of victims of ill-treatment by the police"
Lindheim and others v. Norway	12/06/2012	under new legislation, lessess were entitled to demand an unlimited extension of rent contracts on the same conditions as applied previously	article 1 Protocol 1	the problem is in the law + reference to Hutten-Czapska v. Poland.	S.O. Flaaten and G. Hika	no	no	no
Iacov Stanciu v Romania	24/07/2012	detention conditions	article 3	para 196: structural and recurrent problem of overcrowding and the resulting, inadequate conditions of detention	Ms Mihaela Ghirca and Mr Bogdan Dragoş (legal aid).	no	Association for the Defence of Human Rights in Romania – the Helsinki Committee (APADOR-CH)	para 166: prisoners in general in vulnerable position
Aslakhanova v Russia	18/12/2012	disappearances in Grozny or the Grozny District in Chechnya on various dates between 2002 and 2004 and no effective investigations	Article 2 + article 3 + article 5 + article 13	very elaborate! Para 216 and onwards. More than 120 similar judgments already (on the combination of 2, 3, 5 and 13) + 100+ pending => systemic problems at the national level that affect core human rights.	lawyers of the NGO Stichting Russian Justice Initiative (SRJI) (in partnership with the NGO Astreya) and Mr D. Itslayev	yes! Stichting Russian Justice Initiative and Astreya	no	No
Oleksandr Volkov v. Ukraine	9/01/2013	dismissal from post of judge at Supreme Court	article 6	para 199: serious systemic issues as to the functioning of the Ukrainian judiciary	Mr P. Leach and Ms J. Gordon, lawyers of EHRAC	yes! EHRAC	no	no
Vlad and others v. Romania	26/11/2013	length of proceedings and no effective remedy in that regard	article 6 + article 13	para 154 and onwards: already 200 similar cases decided and 500+ currently pending.	Mr Bogdan Dorin Duda	no	no	no
Bittó and others v. Slovakia	8/01/2014	rent control rules	article 1 para 1, both separate and j° article 14	para 133 and onwards: "a situation" (implied systemic) + 13 applications pending involving 170 persons	Mr J. Brichta, a lawyer practising in Bratislava, and Mr M. Siman of EL Partners s.r.o	no	no	no
Grande Stevens and others v. Italy	4/03/2014	unfair proceedings, not before an independent and impartial tribunal, no peaceful enjoyment of possession, violation of ne bis in idem	article 6 + article 1 Protocol 1 + article 4 Protocol 7	no	Mr A. Bozzo and Mr G. Bozzi, Mr. N. Irti	no	no	no

name of the case	date of the case	issue	convention rights	reason for systemic	representation for the applicant	ngo involvement	third party interventions	vulnerable applicants
Harakchiev and Tolumov v. Bulgaria	8/07/2014	sub-standard detention conditions	article 3 + article 13	the problem is in the law + has given rise to similar applicants	Mr M. Ekimdzhiev and Ms S. Stefanova	no	no	no
Mansur Yalçin v. Turkey	16/09/2014	compulsory religious culture and ethics classes taught in primary and secundary schools infringed on right to education	article 2 Protocol 1	the education system does not provide the possibility at all for the parents' convictions to be respected.	Mr N. Sofuoğlu and Mr S. Topçu	no	no	no
S.Z. v. Bulgaria	3/03/2015	Undue delays in criminal proceedings and failure properly to investigate rape and assault allegations	article 3	the Court saw a number of similar cases and called this a recurrent problem.	Y. Grozev et N. Dobreva	no	no	yes, as a victim of human trafficking and forced prostitution
Novruk and others v Russia	15/03/2016	applicants alleged that they were victims of discrimination on account of their health status (HIV) in the determination of their applications for residence permits	article 8 j° article 14	extensive explanation (paras 131 and onwards)!! It is a structural issue, but national legislation under way. If this is not enough, the court will maybe apply the PJP on the next cases.	Mr. Novruk: represented by Irina Khrunova, associated to NGO Agora (+ Pussy Riot lawyer; renowned human rights lawyer); Ms. Kravchenko: represented by Nadezhda Yermolayeva, human rights lawyer; Mr. Khalupa: represented by D. Bartenev, renowned human rights lawyer and director of a number of (LGBT) NGO's (Mental Disability Advocacy Center, European Commission on Sexual Orientation Law,...)	?	no	yes (people with HIV are a vulnerable group) para 100
Zherebin v Russia	24/03/2016	lenghty pre-trial detention without sufficient reasons	article 5	para 78: systemic problem "originated in a widespread problem resulting from a malfunctioning of the Russian criminal justice system which has affected, and may still affect in the future, a considerable number of persons charged in criminal proceedings". However, no explanation as to why the court didn't apply the PJP.	Mr D. Agranovskiy	?	no	no

Annex 9

VI-F OVERVIEW OF CASES MENTIONING A SYSTEMIC ISSUE WITHOUT A PROCEDURAL CONSEQUENCE[1033]

name of the case	date of the case	issue	convention right	reason for systemic	representation for the applicant	ngo involvement	third party intervention	vulnerable applicant
Holomiov v. Moldova	7/11/2006	inhuman and degrading detention conditions, lack of adequate medical aid and breach of right to liberty	article 3 + article 5	!! Was not marked by the Court as being systemic. However, in his dissent, Judge Pavlovschi, the Moldovan judge(!!), expresses his regret that the judgment does not stress the systemic problem of 'tactit prolongation' of pre-trial detention, based on the Moldovan legislation.	Mr Sergiu Gogu, a lawyer practising in Chişinău and a member of the non-governmental organisation "Promo-Lex"	yes! Promo-Lex	no	no
Makharadze and Sikharulidze v. Georgia	22/11/2011	failure to protect life and health in prison	article 2	para 54: structural problem of inadequate monitoring and treatment of prisoners suffering from serious contagious diseases, such as tuberculosis (at the material time)	Mr Zaza Khatiashvili and Mr Ioseb Khatiashvili (human rights lawyers but not explicitly afficiliated to an organisation - Mr. Khatiashvili is the head of the Georgian Bar Association)	?	no	yes, in general: persons in custody are in a vulnerable position (para 71)
Konstantin Markin v Russia	22/03/2012	refusal to grant him parental leave because he belonged to the male seks	article 8 j° article 14	yes (para 144), because applied to all servicemen in the army	Ms K. Moskalenko (human rights lawyer and member of the NGO Moscow Helsinki Group)jand Ms I. Gerasimova, lawyers practising in Moscow, and Ms N. Lisman, lawyer practising in Boston (legal aid)	NGO Moscow Helsinki Group	the Human Rights Centre of the University of Ghent	yes (para 159)

name of the case	date of the case	issue	convention right	reason for systemic	representation for the applicant	ngo involvement	third party intervention	vulnerable applicant
Centro Europa 7 S.R.L. and Di Stefano v. Italy	7/06/2012	ailure to allocate the applicant company the necessary frequencies for television broadcasting had infringed their right to freedom of expression, and especially their freedom to impart information and ideas.	article 10 + article 14 + article 6 + article 1 Protocol 1 +	structural nature was stressed by the third party (para 128), however the court did not address it specifically	Mr A. Pace, Mr R. Mastroianni, Mr O. Grandinetti and Mr F. Ferraro	?	Open Society Justice Initiative	no
Tarakhel v. Switzerland	4/11/2014	the absence of individual guarantees as to how asylum seekers would be taken charge of, in view of the systemic deficiencies in the reception arrangements for asylum seekers in Italy.	article 3 + article 8	structural inadequacy of reception facilities for asylum-seekers in Italy was uttered by the applicants. The Court did not explicitely mention this was the case but uttered grave concerns as to the current capacities of the system.	Ms Chloé Bregnard Ecoffey, acting on behalf of the Legal Aid Service for Exiles	the Legal Aid service for Exiles	Observations were submitted by the Italian, Dutch, Swedish, Norwegian and United Kingdom Governments and by the organisation Defence for Children, the Centre for Advice on Individual Rights in Europe ("the AIRE Centre"), the European Council on Refugees and Exiles ("ECRE") and Amnesty International	para 97: migrants as particularly underprivileged and vulnerable population group; para 99: migrant children are extremely vulnerable

[1033] It must be emphasized that these cases are rare and hard to find. The first case in this chart of Holomiov v. Moldova for instance did not mention in the judgment that the issue was systemic. The Moldovan judge in his dissent however clarified that it was. This chart is meant to give an indication as to the kinds of cases which are being treated completely as individual cases but involve systemic issues.

name of the case	date of the case	issue	convention right	reason for systemic	representation for the applicant	ngo involvement	third party intervention	vulnerable applicant
Söro v. Estonia	3/09/2015	the publication of information about his service in the former State security organisations had violated his right to respect for his private life	article 8	in the separate opinions, the systemic impact of the judgment was uttered multiple times	Ms M. Valge	?	no	no
Mursic v Croatia	20/10/2016	the conditions of his imprisonment had been inadequate, principally owing to a lack of personal space	article 3	structural problem of inadequate detention conditions was uttered by the applicant, however, the court found that " The present case does not raise a structural issue concerning the conditions of detention in Croatia." (para 143)	Mr Z. Vidović (legal aid)	?	joint third-party comments were received from the Observatoire international des prisons – section française (OIP-SF), Ligue belge des droits de l'homme (LDH) and Réseau européen de contentieux pénitentiaire (RCP). Further third-party comments were received from the Documentation Centre "L'altro diritto onlus"	no

Annex 10 – Rule 61 of the Rules of Court

Rule 61 – Pilot judgment procedure[1034]

1. The Court may initiate a pilot-judgment procedure and adopt a pilot judgment where the facts of

an application reveal in the Contracting Party concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications.

2. (a) Before initiating a pilot-judgment procedure, the Court shall first seek the views of the parties

on whether the application under examination results from the existence of such a problem or dysfunction in the Contracting Party concerned and on the suitability of processing the application in

accordance with that procedure.

(b) A pilot-judgment procedure may be initiated by the Court of its own motion or at the request of

one or both parties.

(c) Any application selected for pilot-judgment treatment shall be processed as a matter of priority

in accordance with Rule 41 of the Rules of Court.

3. The Court shall in its pilot judgment identify both the nature of the structural or systemic problem

or other dysfunction as established as well as the type of remedial measures which the Contracting

Party concerned is required to take at the domestic level by virtue of the operative provisions of the

judgment.

4. The Court may direct in the operative provisions of the pilot judgment that the remedial

measures referred to in paragraph 3 above be adopted within a specified time, bearing in mind the

nature of the measures required and the speed with which the problem which it has identified can

be remedied at the domestic level.

[1034] Rule 61 of the Rules of Court, 14 November 2016.

5. When adopting a pilot judgment, the Court may reserve the question of just satisfaction either in

whole or in part pending the adoption by the respondent Contracting Party of the individual and general measures specified in the pilot judgment.

6. (a) As appropriate, the Court may adjourn the examination of all similar applications pending the

adoption of the remedial measures required by virtue of the operative provisions of the pilot judgment.

(b) The applicants concerned shall be informed in a suitable manner of the decision to adjourn. They

shall be notified as appropriate of all relevant developments affecting their cases.

(c) The Court may at any time examine an adjourned application where the interests of the proper

administration of justice so require.

7. Where the parties to the pilot case reach a friendly-settlement agreement, such agreement shall

comprise a declaration by the respondent Contracting Party on the implementation of the general

measures identified in the pilot judgment as well as the redress to be afforded to other actual or potential applicants.

8. Subject to any decision to the contrary, in the event of the failure of the Contracting Party

concerned to comply with the operative provisions of a pilot judgment, the Court shall resume its

examination of the applications which have been adjourned in accordance with paragraph 6 above.

9. The Committee of Ministers, the Parliamentary Assembly of the Council of Europe, the Secretary

General of the Council of Europe, and the Council of Europe Commissioner for Human Rights shall be

informed of the adoption of a pilot judgment as well as of any other judgment in which the Court

draws attention to the existence of a structural or systemic problem in a Contracting Party.

10. Information about the initiation of pilot-judgment procedures, the adoption of pilot judgments

and their execution as well as the closure of such procedures shall be published on the Court's website.

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